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Against Freedom of Commercial Expression

Tamara Piety

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AGAINST FREEDOM OF COMMERCIAL EXPRESSION

*Tamara R. Piety**

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*Trespass was an assault against property and therefore a crime, but fraud was fine: fraud was practically a constitutional right, like free speech.*¹

*[T]here is no use trying to find villains, because the problem is in the structure of the situation.*²

INTRODUCTION

Any essay which begins with the words “against freedom” has a heavy burden to carry.³ However, the most important word in the title is “commercial.” There are good reasons to conclude that protection for the freedom of speech of commercial entities should not excite our tenderest solicitude—at least not as a matter of the First Amendment. This is a position that may strike some readers as objectionable, not to say heretical, because although this is not the first time the argument (or something like it) has been made,⁴ it goes against the current trend. That trend is to offer broader protection to commercial speech and corporate speakers than has been extended in the past. And it seems likely to culminate in a decision to do away with the distinction between protected commercial speech and other speech protected by the First Amendment. Such a decision would jeopardize the government’s ability to regulate commerce in the public interest, a power all but the most die-hard of libertarians agree is sometimes necessary⁵ in order to

¹ MAX BARRY, JENNIFER GOVERNMENT 120 (2003).

² THOM HARTMANN, UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS 22 (2002).

³ I hope to demonstrate that we can decline to extend what Steve Shiffrin has called the “free speech principle” to commercial speakers without fear of wandering into “the outer darkness” of repudiating the principle altogether. Steve Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689 (1994).

⁴ Many distinguished scholars have critiqued the notion that commercial speech and/or commercial entities ought to receive broad first amendment protection. Among those writing in the law who have had the most influence on my work are C. Edwin Baker, Daniel Greenwood, Fred Schauer, Steve Shiffrin, Roger Shiner, Lawrence Soley, and Lawrence Mitchell. One of the most recent critiques, although it does not predate the first circulation of this Article, is Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 CONN. L. REV. 379 (2006) (answering this question in the negative).

⁵ Even economist Ronald Coase, who might have been described as a libertarian, or at least a proponent of deregulation, see Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1211 (1991) (describing Coase as “a middle-aged libertarian”), noted that governmental regulation might sometimes be necessary. R. H. Coase, *The Market for Goods and the Market for Ideas*, 64 AMER. ECON. REV. 384, 389-90 (1974).

discourage fraud, promote food and product safety,⁶ clean water, or any of a number of other public interests which may not always be adequately protected by the unfettered operation of the market. A significant constitutional limitation on the government's ability to regulate in these areas seems undesirable.

From its inception the commercial speech doctrine has struck some observers as problematic on several grounds.⁷ One of these grounds has been that it is inappropriate to treat artificial entities as if they were human beings. As Justice Rehnquist put it, "[t]o ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality."⁸ In this article I echo Justice Rehnquist's objection and others that have also been previously voiced. But I add to these critiques some closer examination of marketing practices and their ties to events in several specific areas—business reporting, pharmaceuticals, tobacco, and others—in which I argue that we are reaping negative consequences from de facto unfettered speech such that to do away with the already modest restraints on such speech seems ill-advised.

These criticisms have greater urgency than ever before because there are some indications that the Court is more receptive than it has been in the past⁹ to arguments for a fairly radical expansion of existing protections to corporate and commercial speakers,¹⁰ an expansion which might well have significant negative consequences for the public interest in product safety, public health, environmental policy, market stability, and perhaps many other areas as well. Proposals for expansive protection for commercial speech are radical because they would require a revision of our understanding of the appropriate role of the government in the regulation of commerce and a substantial (not to say

⁶ In 2007 this became a particularly serious source of public concern with respect to products imported from China: tainted food, pet food, toothpaste, medicines, and lead contaminated toys. See, e.g., Megan McLroy, *Mattel Hopes to Reassure Parents With Print Ads*, ADVERTISING AGE, Aug. 14, 2007; Eric Lipton & Louise Story, *Bid to Root Out Lead Trinkets Falters in U.S.*, N.Y. TIMES, Aug. 6, 2007, at A1; *The Diddle Kingdom: Chinese Manufacturing*, ECONOMIST, July 7, 2007, at 63; David Barboza, *When Fakery Turns Fatal*, N.Y. TIMES, June 5, 2007, at C1.

⁷ Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 83-87 (1999) (summarizing critiques).

⁸ *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 38 (1986) (Rehnquist, J., dissenting).

⁹ I refer to the Court's decision in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). Although the Court ultimately did not decide the case, instead dismissing it on the grounds that certorari had been "improvidently granted," the concurring and dissenting opinions accompanying that dismissal indicated that the Court (or at least the Justices writing), had largely accepted Nike's arguments and was receptive to the notion of greater First Amendment protection to corporate and commercial speakers. I have discussed this case in greater detail in an earlier article. See Tamara R. Piety, *Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie*, 78 TEMP. L. REV. 151 (2005).

¹⁰ Corporate speech and commercial speech are different albeit overlapping categories which are described in more detail *infra* Part I.

radical) amount of law reform. So I argue not so much for law reform as for restraint, that is, for courts and commentators to resist the urge to engage in law reform by extending broad constitutional rights of expression to for-profit, non-human entities since, once given, rights are difficult to retract.

As many other observers have noted, the arguments advanced for expansive protection for commercial speech reflect a sort of latter-day *Lochnerism*.¹¹ And just as at that time the phrase “freedom of contract” seemed to refer to a self-evidently untouchable basic principle, so today does “freedom of speech” appear to refer to a self-evident good. It is something of a legal trump card—once invoked it is often a winner.¹² However, a review of the theoretical and political justifications for extending constitutional protection to speech by commercial, non-human entities, and the structural imperatives of corporate governance law, suggest that for-profit entities are not appropriate rights holders under the First Amendment and that arguments for an expansion of existing protection to commercial entities should be rejected.

The commercial speech doctrine, with its extension of a limited, intermediate level of protection for commercial speech, is a doctrine of relatively recent vintage.¹³ It is the natural outgrowth of a slightly older notion that corporations are natural entities, “persons” with rights parallel to those of natural persons.¹⁴ The combination of these ideas, corporations as rights holding “persons,” with the notion of protection for some category of “commercial” speech on the grounds that the listeners were entitled to the information, led to the conclusion that corporate, commercial speakers are entitled to broad First Amendment rights.¹⁵ Although it has happened incrementally, such a conclusion

¹¹ See, e.g., DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 381-93 (1997) (surveying critiques by Mark Graber, Owen Fiss, J.M. Balkin, Morton Horwitz, Cass Sunstein, Frank Michelman, Robert Post, and others regarding the use of claims for First Amendment protection by powerful commercial interests much as claims for protection of freedom of contract were used in an earlier period).

¹² Professor Daniel Greenwood has called this phenomenon “First Amendment imperialism,” the tendency for the First Amendment to dominate and colonize every other body of law. Daniel J. H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659 (1999).

¹³ See, e.g., Stern, *supra* note 7, at 58.

¹⁴ See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 67 (1992) (the natural entity theory of the corporation “was nowhere to be found in American legal thought” in 1886 and only emerged a decade later).

¹⁵ ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY* 257-59 (2000). I am making this claim, as I think McChesney does, on the basis that the idea of corporate personhood makes rights seem “natural,” a natural outgrowth of the principle, albeit not a necessary one (as I argue further below) or an inevitable one. The case law, however, does not explicitly rely on this argument. See Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863 (2007). I agree with Professor Winkler that the problem in this area is largely one of corporate governance and that large corporations would find a way to influence government with or without the legal fiction of personhood. *Id.* at 872-73. But I think he underestimates the power of the metaphor to influence thought and to make the constitutional

represents a fairly dramatic revision of the understanding of what are the appropriate boundaries between protection for speech and the government's ability to regulate commerce.

Before the latter half of the twentieth century there was little examination of the question of whether speech in aid of transacting business was protected by the First Amendment. Commerce and speech were largely viewed as separate categories, notwithstanding that commerce, like any other life activity, is often conducted with the assistance of speech and despite the fact that First Amendment protection for expressive activity is not limited to protection for words. The late 19th and early 20th century saw many legislative attempts to deal with what might be called market failures in the wake of industrialization. Among these attempts were the antitrust and labor laws of the early twentieth century and the reforms of Roosevelt's New Deal. These attempts to respond to the political and social problems arising from commerce were met with objections that they violated freedom of contract and interfered with property rights. Ultimately these objections were overcome, ushering in, for better or for worse, the era of the administrative or regulatory state. However, the objections did not go away, they simply changed shape and resurfaced in claims for protection under the First Amendment.

Today many attempts to regulate commerce meet with First Amendment objections. And even areas previously thought to be appropriately regulated have been newly attacked on First Amendment grounds.¹⁶ The argument is that if corporations are appropriate speakers and commerce is a subject worthy of protection under the First Amendment, then there is no intellectually respectable basis for an intermediate level of protection for commercial speech and speakers and so such speech and speakers should receive the full protection afforded to expressive and political speech under the First Amendment. However, if the most extreme form of this argument is adopted it may have serious implications for the government's ability to regulate in the public interest, which may in turn have negative social consequences for health, safety, and general welfare. One need not assume regulation is invariably better than market mechanisms to deal with threats to the general welfare like tainted food or defective products in order to conclude that it might be somewhat rash to make the inverse assumption, that market mechanisms are invariably better than

decisions seem unassailable. *See also* THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 191 (Beard Books 2000) (1937) ("[T]he personification of the great corporation actually worked to monopolize completely the mantle of protection designed for the individual.").

¹⁶ For example, proposals have been made to extend some First Amendment protection to areas currently covered by securities laws and regulated by the SEC. *See* Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223 (1990) (regulation that was generally thought to be desirable and necessary in the wake of the stock market crash of 1929).

governmental intervention, and then to back that assumption up by preemptively disarming the government and extending a constitutional shield to commercial speech. Experience and present-day conditions suggest that would be unwise.

In this article I argue that none of the proposed theoretical justifications for protecting freedom of expression support application of its most robust incarnation to for-profit corporations.¹⁷ To the contrary, a review of those theories leads to the conclusion that the interests the First Amendment was meant to protect are unlikely to be advanced by broad protection for the speech of for-profit corporations. And although it is undoubtedly the case that (1) governmental suppression of truthful speech should be viewed with suspicion, that (2) the provision of much commercial information is a social good and (3) that stimulation of commerce is a legitimate political goal, we might nevertheless conclude that the First Amendment is not a particularly apt framework for analyzing problems presented by commercial speech.

This article proceeds in four parts. Part I is definitional. This part offers a brief review of the commercial speech doctrine, the parallel corporate speech case law, and the doctrinal development of the meaning of "commercial speech."

Part II discusses the corporate person and points to some specific features of that person that might make us wary of extending a broad constitutional shield to speech from such institutions.

Part III reviews the work of Thomas Emerson, whose article *Toward a General Theory of the First Amendment*¹⁸ was extremely

¹⁷ This is also not an original observation. See, e.g., Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2355 (2000) ("The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories."); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1283 (1983) ("Speech interacts with the rest of our reality in too many complicated ways to allow the hope or expectation that a single vision or a single theory could explain, or dictate helpful conclusions in, the vast terrain of speech regulation."); see also Stern, *supra* note 7.

¹⁸ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 888 (1963). See also THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* (1968) [hereinafter EMERSON, *TOWARD A GENERAL THEORY*]. These ideas were further articulated in THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970) [hereinafter EMERSON, *SYSTEM OF FREEDOM OF EXPRESSION*]. I turn to Emerson for his proposal about the interests the First Amendment is thought to protect rather than for his analysis of specific cases or his policy proposals. As the commercial speech doctrine had not yet been articulated, Emerson does not use the term and only devotes a tiny portion of his discussion to the problem of economic regulation. EMERSON, *SYSTEM OF FREEDOM OF EXPRESSION*, *supra*, at 413-17, 423-25 (using the terms "commercial communication" and "communication of a commercial nature" and noting that this area was not well defined). And although he also noted that private actors could represent a threat to freedom of expression and that the proscription against governmental interference might be appropriately relaxed to remedy that private suppression, he seemed to focus more on political interest groups and unions than for-profit

influential in the development of First Amendment doctrine. Emerson proposed that First Amendment protection was premised on the protection of (broadly speaking) four key interests: (1) self-expression or self-actualization, (2) protection for truth, (3) protection of democracy or democratic process, and (4) as a means of social stabilization. Analyzing the evidence of how for-profit corporations act and the structural incentives in their organization, I show how existing practices of commercial speech suggest that none of Emerson's four goals are advanced by offering expansive First Amendment protection to commercial speech or to for-profit speakers generally.¹⁹

Part IV covers what I have called "persistent objections" to the arguments I present in the preceding sections. In this section I offer some rebuttals to these common objections. Here and throughout the Article I offer specific examples as evidence of problems that would seem to be exacerbated if there was less power to regulate such speech. Nevertheless, because the category of commercial speech is immensely complicated and because technology can profoundly change the practices and the forms of commerce and communication in ways which may implicate this discussion, I think it is impossible to anticipate all of the possible questions, let alone all of the correct answers. However, in the conclusion I propose that whatever the answers are, they are not necessarily best supplied by an expansive application of First Amendment protection to commercial speech.²⁰

A few methodological caveats are in order. I am not offering a new theory. Rather I am simply applying old ones in a slightly different way. Most prominent First Amendment legal theorists appear to agree that the justifications for protecting freedom of expression are complex and multifaceted. And it seems to me self evident that there is no unifying, conscious theme to be teased out of the Supreme Court precedent—whether from an originalist, historical perspective, a straightforward analysis of the words or a review of the doctrine.²¹ Many of the Supreme Court's decisions in this area are in conflict with one another, at least superficially, even if, as Robert Post has

corporations. EMERSON, TOWARD A GENERAL THEORY, *supra*, at 105-10.

¹⁹ I use Emerson because it seems to me that every other theorist uses some variation of one or more of the interests he proposed, thus by reviewing these it would seem to address the theories raised by others. For a summary of the most prominent of these theorists, see GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 3-18 (2003). In my view the checking function articulated by Vincent Blasi could be part of the self-governance or democracy promoting value. Lee Bollinger's theory about the value of tolerance and the development of character similarly appear to be ways to re-frame questions about self-fulfillment, autonomy, and the interest in a safety valve.

²⁰ Hereafter when I refer to "commercial speech" I will be including all speech by for-profit entities. This makes the term as I use it here different than it is in the commercial speech doctrine.

²¹ See STONE ET AL., *supra* note 19, at 3-6.

persuasively argued, those familiar with the doctrine “can predict with reasonable accuracy the outcomes of most constitutional cases.”²² So this article does not attempt to reconcile or harmonize precedent in this way or offer a grand theory in competition with any of those previously offered. Rather I take here the existing justifications and precedent and review them against observations about actual marketing practices and events.

Although I am not inclined to find a unifying theme in the precedent, I do think it is possible to discern what I will call “legal moods” (for lack of a better phrase) from reading the precedent in light of wider social facts and commentary on those opinions. Such moods might explain why some opinions, while not overruled, are nevertheless not as influential as others or seem to have less of a grip on the collective legal imagination.²³ In making my arguments here though I treat all precedent as equal unless it has been explicitly overruled or its reasoning set aside.

Second, this article draws on literature from many other academic disciplines, as well as many non-academic sources. In particular I think it important in a discussion of advertising to read what advertising and marketing professionals say about their practices. So this article contains many references to materials from these areas. However, when one delves into other disciplines there is always the risk that one has not gone deeply enough, and so this Article may represent a starting point but not an endpoint for inquiry, particularly when I touch on other disciplines. But in some sense there is no purely legal position with respect to a topic like commercial speech. The First Amendment is concerned with the regulation of social matters on which other disciplines can shed some light. So it would seem to behoove those of us in the law to look at these areas as they bear on the decision making process and to look at them as they are, not as we imagine them to be. I attempt to do this understanding that one of the limitations of this approach is that it runs the risk of oversimplification or misunderstanding of observations in other disciplines. Still, if such inquiry is not made it seems we run the opposite risk—that of creating a parallel legal universe concerning a practice like advertising that bears little or no resemblance to the practice in fact.²⁴

²² Post, *supra* note 17, at 2355.

²³ Perhaps it is just a matter of who has the most money to spend. Those with the most money to spend litigating issues important to them may bring cases and file amicus briefs more often. So the frequency with which arguments in support of expanded protection for commercial speech appear may be more a function of the wealth of its supporters, not an indication of any legal “mood.” Still, if an argument is raised often enough it begins to seem like a trend. And if it goes unopposed, it may prevail by default.

²⁴ We could actually make this objection about law generally and conclude that law contains representations of the world outside of it that are subject to the objection that it is a picture crafted

At the same time, law has some distinctive requirements not imposed on other disciplines. The application of law requires answers to specific questions and the resolution of disputes in a position of imperfect knowledge. It may even require “answers” to the unanswerable, such as the monetary value of the loss of a limb. This may mean that even if lawyers, judges, and legal academics had a better grasp of the applicable disciplines it would not always be possible to alter the law in ways that would take account of the insights of such disciplines if they do not provide what the law needs—definite answers in a time-bounded context. The questions that arise in the First Amendment context, as well as the attempts in the jurisprudence to answer them, may illustrate the need for pragmatic revision of the doctrine in light of experience and context—what Robert Post called Holmes’s “pragmatic epistemology.”²⁵ So it seems to me as perilous for the social welfare to delve not at all into the subject matters to be regulated as it is to go into them too shallowly. The commercial speech doctrine has suffered from far too little reference to the actual practice of advertising, marketing, and the concerns of the market. If this article adds anything new it is the incorporation of more of these materials than usual. Nevertheless, the subject will undoubtedly benefit by closer investigation of a number of issues raised here, and I do not expect this to be the last word.²⁶

Finally, what I offer here is a pragmatic critique of the argument for broad First Amendment protection for commercial speech. And although the critique is informed by philosophies of the good, the appropriate aims of good government, and notions of free will, it is not a work of philosophy. It is intended as a working analysis to apply to concrete problems which may appear before courts. There is obviously much deeper work that could be done on questions of what represents the public good and the appropriate role of government in attempting to promote it. It is undoubtedly the case that in this article I assume fairly

more to the demands of the practice of law and dominant interests than it is descriptive of the world it purports to represent. For example, the law posits all sorts of imaginary bargaining with respect to the terms of a contract for a credit card, terms of employment, rationality of a consumer choice, freedom of exit by a shareholder and all manner of other scenarios that may on the whole not conform with our lived experience (for example, few people read the fine print of credit card agreements; most employees are not “bargaining” for terms of employment but are rather subject to a take-it-or-leave-it offer from employers; there is little evidence of rational deliberation in many consumer choices, particularly where those choices are made in the context of advertisers’ intentional attempts to stimulate the “reptilian brain” response; and many shareholders hold their shares in retirement funds over which they have little control and so cannot exercise the exit option when one of the companies in which they are invested engages in a strategy with which they disagree).

²⁵ Post, *supra* note 17, at 2360.

²⁶ For example, there may be some issues which are susceptible to empirical work to discover if our intuitions or stated justifications for a particular practice can be justified or supported by that work.

general definitions of “truth” and “public welfare” that are open to question and could be hotly contested in specific instances. But the analytical structure I propose here is provisional and essentially legal, that is, it is not one that will generate definitive answers. It is only suggestive of the direction of outcomes, not determinative of them. The reader should bear these caveats in mind with what follows.

I. COMMERCIAL SPEECH, THE DOCTRINE, AND CORPORATE SPEECH

At bottom, the Enron and WorldCom cases are about false advertising.²⁷

A. *Commercial Speech*

In discussing commercial speech we start with a problem. There is not a very clear working definition of what commercial speech is.²⁸ One might observe, as the Court has, that the mere fact that the speech is created in the hopes of earning money is not what makes it commercial.²⁹ Books, movies, television, and other entertainment are (presumably) usually produced for money.³⁰ Yet when talking about commercial speech most people seem to feel that, like obscenity, they know it when they see it. When confronted with definitional difficulties, a common response is to throw up one’s hands and conclude that because commercial speech is difficult to define, if it deserves *some* First Amendment protection, the only intellectually respectable position is that it should receive *full* First Amendment protection, even though historically commercial speech was not protected and despite good reasons for rejecting this approach because it would undermine much of the government’s ability to regulate commerce.³¹ I propose a definition that focuses on both the speaker and the content.

²⁷ Edward J. Janger, *Brandeis, Business Ethics, and Enron*, in *ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS* 69 (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

²⁸ This is not necessarily a bad thing as Professor Nat Stern has pointed out. Stern, *supra* note 7. For more discussions of the definitional difficulties see Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143 (2004).

²⁹ As the Supreme Court has noted, “[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . . [or because] it is carried in a form that is ‘sold’ for profit” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (internal citations omitted).

³⁰ *Id.*

³¹ Very few people argue that *all* regulation is undesirable even if they think a lot of it is.

One definitional question is: Is it the identity of the speaker or the content of the speech that makes speech “commercial”? Here I argue identity determines content because when the speaker is a for-profit corporation the content is always, by virtue of the nature of the for-profit corporate structure, “commercial.” Even if the subject is not obviously commercial, the purpose of such speech is always to advance a commercial interest.³² Every time a corporation offers its opinion about climate change or tax reform or promotes awareness of breast cancer or any other political or social issue of public concern, the only legitimate basis for it doing so, pursuant to principles of corporations law, is that management has made the determination that this communication would enhance the corporation’s profitability. That may not disqualify the speech as valuable or of public interest, but because of large corporations’ ability to spend disproportionately larger amounts of money on speech than most individuals, one could conceivably find it legitimate to regulate it in the same way that the government might reasonably impose limits on corporate campaign contributions or the deductibility of charitable contributions.³³ This is not a position that has been adopted by the Supreme Court, however, and recent developments in the campaign finance area suggest that even there the distinction may be losing its persuasiveness.³⁴

There is no question that commercial speech has not been clearly defined,³⁵ and perhaps a completely satisfactory definition will remain elusive. Nevertheless, a provisional definition might be that commercial speech is speech offered by a business entity or person with the intention of promoting a commercial activity (product or service) other than the speech itself. This might not be sufficient as a longstanding definition, but it is a starting point from which to assess what we are talking about when we talk about commercial speech. And using this definition it would be difficult to overemphasize the enormous social impact of speech in the service of commerce.

Consider one small slice of that speech—television advertising. A study by the American Psychological Association, published in 2004, concluded that in the year 2000, average adolescents in America were exposed to approximately 40,000 ads per year and that advertisers spent \$12 billion on such ads.³⁶ This figure does not take into account

³² See *infra* notes 184-222 and accompanying text.

³³ See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659 (1990) (corporations as creatures of law may be legitimately subject to regulation concerning speech relating to elections). But see *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (rejecting expenditures restriction on the basis of status as corporation, although corporation in question was not for-profit).

³⁴ See *Fed. Election Comm’n*, 127 S. Ct. 2652.

³⁵ See Chemerinsky & Fisk, *supra* note 28.

³⁶ Press Release, Am. Psychological Ass’n, *Television Advertising Leads to Unhealthy Habits*

billboards, newspaper and radio advertising, point-of-sale displays, direct mail, flyers, and innumerable other places where advertising or promotion identifiable as such appears. Another study, covering all expenditures in traditional advertising, reports that national advertisers spent \$105 billion on such advertising in 2006.³⁷ That is a lot of advertising but it is only the tip of the iceberg.

Figures for traditional advertising spending do not capture all spending on commercial speech as defined above. Speech in service of commerce can appear as news stories that are verbatim reprints of press releases issued by a commercial company,³⁸ video news releases (press releases in video form known as VNRs) aired as “news” items without attribution,³⁹ product placement in entertainment,⁴⁰ product references in textbooks⁴¹ and other educational materials, “stealth marketing”⁴² in

in *Children*; Says APA Task Force (Feb. 23, 2004), available at <http://www.apa.org/releases/childrenads.html>.

³⁷ Bradley Johnson, *Leading Advertisers Report: Spending Up 3.1% to \$105 Billion*, ADVERTISING AGE, June 25, 2007, available at http://adage.com/print?article_id=118648. Another source pegs total U.S. advertising spending for all traditional media categories to be \$152.3 billion. TNS Media Intelligence Forecasts 1.7 Percent Increase in U.S. Advertising Spending for 2007, TNS MEDIA INTELLIGENCE, June 12, 2007, <http://www.tns-mi.com/news/06122007.htm>.

³⁸ See, e.g., *Do We Have a Story for You!; The Public Relations Industry*, ECONOMIST, Jan. 21, 2006, at 57-58 (“Media commentators have noted how PR material is now being published by some local newspapers virtually unedited and unchecked.”).

³⁹ *FCC Pursues VNR Inquiry*, ODWYERPR.COM, Aug. 15, 2006, available at http://www.odwyerpr.com/members/0815fcc_vnr_letters_response.htm (available to subscribers); see also DIANE FARSETTA & DANIEL PRICE, CTR. FOR MEDIA & DEMOCRACY, *FAKE TV NEWS: WIDESPREAD AND UNDISCLOSED* (2006), http://www.prwatch.org/pdfs/FakeTVNews_Apr2006Rpt.pdf.

⁴⁰ See, e.g., *Lights, Camera, Brands; Product Placement*, ECONOMIST, Oct. 29, 2005, at 61-62 (“Product placement is rapidly blurring the line between content and advertising”); see also Trudy Lieberman, *Epidemic*, COLUM. JOURNALISM REV., Mar.-Apr. 2007, available at <http://cjrarchives.org/issues/2007/2/Lieberman.asp>.

⁴¹ In addition to product advertising in traditional textbooks there is apparently one publisher offering free electronic textbooks which are subsidized by the ads. Randall Stross, *Words of Wisdom vs. Words From Our Sponsor*, N.Y. TIMES, Aug. 27, 2006, at 3 (describing publisher Freeload Press’ offering of textbooks free on-line with embedded ads). For a discussion of the infiltration of commercial interests into the university context in a number of ways, see JENNIFER WASHBURN, UNIVERSITY INC.: THE CORPORATE CORRUPTION OF HIGHER EDUCATION (2006).

⁴² “Stealth marketing” is a term of art in the industry that refers to word-of-mouth (“WOM”) advertising efforts. Although the professional organizations for WOM advertising officially take the position that best practices dictate disclosure of the source, the term “stealth” refers to the fact that these efforts often involve direct to consumer marketing that appears as if it is *not* marketing because the person making the pitch, whether an actor posing as a friendly stranger or a friend paid to promote a product, does not disclose the payment. See, e.g., Deborah Branscum, *Marketing Under the Radar*, CMO MAG., Dec. 22, 2004 (reporting on an article in the California Management Review, *Stealth Marketing: How to Reach Consumers Surreptitiously*). For a discussion of stealth marketing and other practices in which marketing or promotional fees are not disclosed, see Ellen Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006). For a discussion of how these PR techniques have penetrated government communication practices, see Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983 (2005). For the most recent outbreak of this phenomenon, see David

the guise of friends or acquaintances being paid to tout a product known as word-of-mouth (WOM),⁴³ and other under the radar attempts to sell a product or service.⁴⁴ One such stealth marketing technique is “flogging”—that is, setting up fake blogs (by which I mean blogs that are not readily identifiable as a part of a marketing plan), or blogging anonymously or under an assumed name as John Mackey, the CEO of Whole Foods, was exposed as doing.⁴⁵

One of the most troubling forms that speech in service of commerce can take is where the speech is not clearly identifiable as coming from a commercial source at all but instead appears to emanate from a third-party, non-commercial source. This is a common public relations tactic. The idea is to gain credibility for the message by putting it in what appears to be another speaker’s mouth. “To get something going from nothing, you need the validity that only third-party endorsements can bring.”⁴⁶ Typically, it simply involves getting a newspaper or other media to carry the message by reprinting a press release or by getting some authoritative third party expert to make the case.⁴⁷ For example, in order to encourage physicians to prescribe its

Barstow, *Behind Analysts, Pentagon’s Hidden Hand: Courting Ex-Officers Tied to Military Contractors*, N.Y. TIMES, Apr. 20, 2008, at 1 (describing efforts by Pentagon to place their own nominees, with ties to military contractors, as apparently expert commentators in TV news programs without disclosing the Pentagon’s role in coordinating their statements). It is interesting to speculate whether the prominence of marketing and public relations people in the role of political advisors has played a role in the adoption of techniques from those professions in politics or whether it has ever been thus.

⁴³ Rob Walker, *The Hidden (in Plain Sight) Persuaders*, N.Y. TIMES MAG., Dec. 5, 2004, at 69 (describing WOM marketing efforts also known as “buzz marketing”).

⁴⁴ For a brief discussion of the ubiquity of advertising, see Walter Kim, *Here, There and Everywhere*, N.Y. TIMES MAG., Feb. 11, 2007, at 17 (quoting some research suggesting that adults are exposed to as many as 5,000 ads per day). Apparently there is no consensus on just how many ads people are exposed to (on average) everyday. Estimates run “[s]omewhere between 254 and 5,000” per day. Matthew Creamer, *Caught in the Clutter Crossfire: Your Brand*, ADVERTISING AGE, Apr. 1, 2007, available at http://adage.com/print?article_id=115873. Some have proposed that the solution to ad clutter is to make advertisers pay for ads rated as “bad” by consumers. Jack Neff, *Clutter Pollution Solution: Make ‘Em Pay for Bad Ads*, ADVERTISING AGE, Apr. 8, 2007, available at http://adage.com/print?article_id=115984. The logistics of the rating system to implement this proposal have yet to be worked out.

⁴⁵ Mackey, posting comments under an anagram of his wife’s name, allegedly posted positive comments about himself and about Whole Foods, and negative ones about the company he was seeking to acquire, Wild Oats, on a blog. Christopher Caldwell, *Not Being There*, N.Y. TIMES MAG., Aug. 12, 2007, at 11, available at <http://www.nytimes.com/2007/08/12/magazine/12wwln-lede-t.html?ref=magazine>.

⁴⁶ AL RIES & LAURA RIES, *THE FALL OF ADVERTISING & THE RISE OF PR*, at xx (2002). This is known as the “third party technique.” See Source Watch, Ctr. for Media & Democracy, Third Party Technique, http://www.sourcewatch.org/index.php?title=Third_party_technique (last visited Apr. 1, 2008).

⁴⁷ “[T]he one advantage of PR makes up for all of its disadvantages. PR has credibility, advertising does not. People believe what they read in newspapers or magazines or what they hear on the radio or see on television.” RIES & RIES, *supra* note 46, at 85. One academic textbook on public relations claims that “upwards of 70 percent of daily newspaper copy” emanates “from public relations-generated releases.” FRASER P. SEITEL, *THE PRACTICE OF*

antidepressant Paxil to adolescents suffering from depression, GlaxoSmithKline allegedly enlisted doctors it identified as “Key Opinion Leaders” to publish favorable reviews in the academic literature of a study of Paxil.⁴⁸ Unfortunately for those receiving the prescription, the study did not (according to some observers) support the conclusion that Paxil was appropriate for use in treating adolescent depression.⁴⁹

If no third party is willing to carry the message (or in addition to such third parties), companies can manufacture the apparently neutral third party. For example, with the assistance of its public relations firm, Wal-Mart set-up an organization named “Working Families for Wal-Mart.” The impression it conveyed was of an independent, grassroots political organization.⁵⁰ Its function was to bolster Wal-Mart’s argument that, despite the criticisms, its labor practices actually benefited working families by providing a place where workers and customers could post positive testimonials about their experiences. It claimed that the organization was giving voice to the millions of Americans who believed Wal-Mart made positive contributions to their families and communities.⁵¹ “Working Families for Wal-Mart” had a web site and a blog, none of which clearly identified it as generated by and on the behalf of Wal-Mart.⁵² Instead, it claimed that its membership was made up of diverse community leaders in business, education, and other civic fields across America who had first-hand knowledge of Wal-Mart’s positive contributions to communities.⁵³ But it did not say that Wal-Mart had a role in funding the group or that its public relations firm, Hill and Knowlton, was associated with its formation.⁵⁴

PUBLIC RELATIONS 38 (8th ed. 2001) (emphasis added).

⁴⁸ Shelley Jofre, *Doctoring the Evidence: GlaxoSmithKline Pushes Depression Drug*, CORPWATCH, July 30, 2007, <http://corpwatch.org/article.php?id=14606>. The most troubling aspect of this incident was that GSK apparently engaged in this effort because the study in question had too many adverse incidents, making it clear that the pharmaceutical company would be unlikely to receive FDA approval to prescribe for teenagers. Jofre reports that the company’s internal correspondence reflected that management felt the company had gone as far as it was going to be able to go with sales for adult patients and so expansion in the teen market would have to come through off-label uses since there were too many adverse incidents to expect that the FDA would approve the drug for use in treating teens. Apparently the fact that such uses might come with an arguably unacceptably high risk of teen suicides to those receiving the medication was not a dispositive factor.

⁴⁹ *Id.*

⁵⁰ The original site is now inactive but you can find more information about the site at one set up by Wal-Mart Watch, Working Families for WalMart?, <http://workingfamiliesforwalmart.com/>.

⁵¹ See *supra* notes 50-52 and accompanying text.

⁵² See, e.g., PR Watch.org, Ctr. for Media & Democracy, Front Group’s Fake Blog Just One of Wal-Mart’s Recent Woe’s, <http://www.prwatch.org/node/5316> (last visited Apr. 1, 2008).

⁵³ *Id.*

⁵⁴ For more information on the group, see Source Watch, Ctr. for Media & Democracy, Working Families for Wal-Mart,

This technique was pioneered by the tobacco companies when they pooled resources and combined forces to form, pursuant to advice from Hill and Knowlton,⁵⁵ the Council for Tobacco Research. The Council was intended to serve as a third-party spokesperson with the explicit aim of using the entity to issue “information” on behalf of tobacco companies to counter the growing body of evidence of the negative health consequences of smoking.⁵⁶ The efforts of the CTR and similar organizations founded by the tobacco companies themselves, as well as the articles and publications sponsored by it, played an important role in minimizing the health dangers of smoking for several decades. This was the role they were intended to play. It worked very well for decades and, according to some, inspired similar efforts to create “a paralyzing fog of doubt around climate change”⁵⁷ to perhaps potentially even more devastating effect, since everyone is affected by global climate change.

In short, there is an enormous amount of speech that is commercial—whether we know it or not. This speech is issued by entities with vast resources, far more than any comparable institution, except perhaps the U.S. government itself.⁵⁸ So it stands to reason, both because of its scale and its ubiquity, that commercial speech has a significant impact on society, even if we cannot say for certain what that

http://www.sourcewatch.org/index.php?title=Working_Families_for_Wal-Mart (last visited Apr. 2, 2008) (website sponsored by the Center for Media and Democracy).

⁵⁵ The firm resigned the account in 1969, reportedly because of ethical concerns about the tobacco industry’s application of the strategy Hill and Knowlton developed for it. KAREN S. MILLER, *THE VOICE OF BUSINESS: HILL & KNOWLTON AND POSTWAR PUBLIC RELATIONS* 141-45 (1999). The basic strategy of “creating doubt about the health charge without actually denying it”; characterizing smoking as a “right”; and claiming that objective scientific research would be the “only way to resolve the question of health hazard” continued for several more decades. *Id.* at 143. And it has proven to be a template for the response to concerns about climate change.

⁵⁶ *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 41 (D.D.C. 2006).

⁵⁷ Sharon Begley, *The Truth About Denial*, *NEWSWEEK*, Aug. 13, 2007, at 20, available at <http://www.newsweek.com/id/32482> (last visited Apr. 2, 2008). Begley reports that the American Enterprise Institute, an organization which has received funding from ExxonMobil, was offering \$10,000 for articles to dispute the latest report from the Intergovernmental Panel on Climate Change (IPCC) that reflected a consensus that the 1990s “were likely the warmest on record” and that the warming was at least partially attributable to human activities. For a response to an earlier report on the charge that AEI was offering \$10,000 for articles critical of the IPCC report, see Kenneth P. Green & Steven F. Hayward, *Scenes From the Climate Inquisition: The Chilling Effect of the Global Warming Consensus*, *WKLY. STANDARD*, Feb. 19, 2007, at 26, available at http://www.aei.org/docLib/20070222_OTI.pdf. See also Paul Krugman, *Enemy of the Planet*, *N.Y. TIMES*, Apr. 17, 2006, at A21 (recounting efforts by ExxonMobil to sow uncertainty about the reality of global climate change).

⁵⁸ The resources available to large multinational commercial enterprises often outstrip those of all but the richest nations. See Sarah Anderson & John Cavanaugh, *Top 200: The Rise of Corporate Global Power*, *INSTITUTE FOR POLICY STUDIES*, <http://www.corpwatch.org/article.php?id=377> (last visited May 9, 2008) (“The Top 200 corporations’ combined sales are bigger than the combined economies of all countries minus the biggest 10.”).

impacts is. Moreover, large corporations play significant roles in shaping what constitutes “news” and the attitudes of the world around us. And that influence is exercised with what is perhaps unprecedented knowledge of human psychology and motivations.⁵⁹ Marketing research intended to fine tune the ability of marketers to engender positive reactions and thus improve return on investment (ROI) in advertising is a multibillion dollar business and is reflected not only to the venerable focus group and survey, but extends to the accumulation of massive amounts of data⁶⁰ through grocery store “savings programs,” rebate and warranty requests, surveys, census data,⁶¹ fMRI scanning, and other research that, were it conducted in a university setting (and sometimes it is under the auspices of corporate grants to university, but that is another story), would presumably be subject to rigorous IRB standards governing research on human subjects.⁶²

The scale of such research efforts seems particularly troubling when it comes to targeting children, since there is no assumption that children are fully rational in the way we assume (however unrealistically⁶³) that adults are and who, because of their relative

⁵⁹ It may be fair to say, and certainly an interesting topic for exploration, that more psychology research has been done by market researchers than by any academic group. And when one considers that much academic research may be sponsored by commercial interests or have an explicitly commercial goal, it seems likely that most intellectual energy, time and effort in areas like psychology has been dedicated to discovering more about what motivates people to buy. For a discussion of the general topic of the commercialization of education, see WASHBURN, *supra* note 41.

⁶⁰ See, e.g., Kim Severson, *Seduced by Snacks? No, Not You*, N.Y. TIMES, Oct. 11, 2006, at F1 (reporting on market research tying package size and design to how much people eat); *Market Research C'mon, Mom! Kids Nag Parents to Chuck E. Cheese's*, SELLING TO KIDS, May 12, 1999, available at http://www.findarticles.com/p/articles/mi_m0FVE/is_9_4/ai-5463124 (reporting on Western Initiative Media's “Nag Factor” report); CLOTAIRE RAPAILLE, *THE CULTURE CODE: AN INGENIOUS WAY TO UNDERSTAND WHY PEOPLE AROUND THE WORLD LIVE AND BUY AS THEY DO* (2006) (cultural anthropologist uses insights from psychology and focus group research purporting to identify cultural “codes” that he claims tap into the “reptilian brain” and by-pass rational thought processes in order to sell products). For more on Dr. Rapaille, see the PBS program *Frontline: The Persuaders* (PBS television broadcast Nov. 9, 2003), available at <http://www.pbs.org/wgbh/pages/frontline/shows/persuaders/> (last visited May 9, 2008). Additional types of marketing research are reflected by PATRICK RENVOISÉ AND CHRISTOPHE MORIN, *NEUROMARKETING: UNDERSTANDING THE BUY BUTTONS IN YOUR CUSTOMER'S BRAIN* (rev. ed. 2007) (purporting to use research in neurology to find the “buy button” in the brain and obtain “instant success”); *The Triumph of Unreason?*, ECONOMIST, Jan. 13, 2007, available at http://www.economist.com/science/displaystory.cfm?story_id=8516366 (reporting on similar research in economics identified as neuroeconomics, a field that perhaps overlaps with what is described as behavioral economics).

⁶¹ See, e.g., Douglas A. Kysar, *Kids & Cul-De-Sacs: Census 2000 and the Reproduction of Consumer Culture*, 87 CORNELL L. REV. 853 (2002) (describing degree to which census data was used for marketing purposes).

⁶² For a comprehensive look at the regulation of research on human subjects in all public and some private contexts, see CARL H. COLEMAN ET AL., *THE ETHICS AND REGULATION OF RESEARCH WITH HUMAN SUBJECTS* (2006).

⁶³ The evidence that people do not behave rationally as we often define it with respect to any number of issues seems so exhaustively demonstrated that is difficult not to conclude that

cognitive plasticity and limitations, are more vulnerable to manipulation.⁶⁴ With such power comes corresponding potential for harm on a large scale. So it seems reasonable to suppose that the government might have a legitimate role in regulating some of these communication efforts in an attempt to prevent harm. However, at present, the commercial speech doctrine covers a much narrower slice of commercial communication than that described above.

B. *Commercial Speech Doctrine*

The commercial speech doctrine is a subset of First Amendment jurisprudence that creates a category of intermediate scrutiny for speech falling within its boundaries.⁶⁵ Commercial speech is offered less protection than political or other quintessentially protected speech, but regulation directed at this speech must meet an intermediate scrutiny test that, over the last couple of decades, has begun to look a lot more like strict scrutiny.⁶⁶ Most observers agree the doctrine was created in 1976 in the *Virginia Pharmacy* case.⁶⁷ There, the issue was whether the State of Virginia could forbid pharmacists from advertising drug prices.⁶⁸ A consumer group protested that suppression of truthful speech actually hurt consumers, notwithstanding the State's assertion that price advertising would lead to price wars that would in turn lead to diminished professionalism and hurt consumers in the long run.⁶⁹ Consumers argued this position was excessively paternalistic and that

perpetuation of this assumption in the law is due more to despair about workable alternative presumptions than about any doubt that it is true. For an entertaining summary of some of the research on this question, see CORDELIA FINE, *A MIND OF ITS OWN: HOW YOUR BRAIN DISTORTS AND DECEIVES* (2006). Certainly advertising professionals themselves believe that emotional and psychological appeals that are largely unconscious, unacknowledged and hotly denied are greater motivators of purchasing decisions than the reasons people are willing to articulate. ROBERT B. SETTLE & PAMELA L. ALRECK, *WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT* 31-49 (1986) (describing consumers as mostly motivated by unconscious needs for status, approval and love, and an unwillingness to report that they have been influenced by advertising or to accurately identify motives for purchasing decisions).

⁶⁴ See, e.g., Jon Gertner, *Mom, Is It O.K. If These Guys Market This Stuff to Us?*, N.Y. TIMES MAG., Nov. 28, 2004, at 100. See also JULIET B. SCHOR, *BORN TO BUY: THE COMMERCIALIZED CHILD AND THE NEW CONSUMER CULTURE* (2004); ALISSA QUART, *BRANDED: THE BUYING AND SELLING OF TEENAGERS* (2003).

⁶⁵ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (with respect to commercial speech, governmental regulation need not be "absolutely the least severe" burden on speech that will achieve the desired ends of advancing the state's substantial interest).

⁶⁶ See, e.g., David Vladeck, *Lessons From A Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1055-59 (2004).

⁶⁷ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc. (Virginia Pharmacy)*, 425 U.S. 748 (1976).

⁶⁸ *Id.* at 749-53.

⁶⁹ *Id.* at 766-70.

the government ought not to be in the business of protecting the public from the truth.⁷⁰ The Supreme Court agreed.⁷¹

In order for the Court to find the consumer group had the standing to raise the issue of suppression of *the pharmacists'* speech, the Court had to first find the pharmacists themselves had a First Amendment right to advertise.⁷² With little discussion of this point the Court found they did. But the Court's key holding was that the consumers had a First Amendment right to hear the price information.⁷³ Had the Court been writing on a blank slate it might not have been necessary to make these doctrinal moves or to invoke the First Amendment at all. But because the Commerce Clause, which is directed specifically at licensing government regulation of commerce sets up a fairly undemanding rational basis test, which the rationale advanced by Virginia for its prohibition of price advertising would have almost certainly passed, the consumer advocates who brought the case invoked the First Amendment for the argument that, as listeners, they had a right to hear this price information.⁷⁴ This is a non-obvious reading of the First Amendment's prohibition on the restriction of freedom of speech, but the argument had appeared earlier in the scholarly literature.

Some years before *Virginia Pharmacy* came before the Supreme Court, Professor Martin Redish published an article entitled *The First Amendment in the Marketplace*⁷⁵ in which he argued that speech issued in aid of commerce was entitled to First Amendment protection because such information was critical to market function and market function was an essential part of social welfare and self actualization.⁷⁶ Of course, only truthful information performs this function.⁷⁷ So Redish

⁷⁰ *Id.* at 770.

⁷¹ *Id.* at 756-70.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189 (2004).

⁷⁵ Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971).

⁷⁶ *Id.* at 432-48.

⁷⁷ Actually, it is not entirely clear that only truthful information performs this function. Much false information may also stimulate economic activity. And if that were the sole measure of utility we might say there is no reason for limiting protection to truthful information. However, whether because we place a competing value on truth for its own sake, whether or not it stimulates economic activity, or because we take the position that fraud is its own punishment, that is, false information will ultimately harm the market when consumers find out about it through product failure or otherwise, the official position is that only *truthful* information furthers the social goals reflected in the commercial speech doctrine. The argument that fraud ultimately does not pay even if it stimulates economic activity in the short run seems to overlook the fact that many players enter and exit the market with no intention of staying for the long run. So if they can escape with an economic benefit to themselves they are unconcerned about long-term effects of fraud. Whether or not "crime pays" is both a philosophical and empirical question beyond the scope of this article. However, it does seem safe to say that few would propose doing

argued that it was truthful commercial speech that should be protected, and that such protection was justified on behalf of the listeners (i.e., consumers/market). When presented with the issue in *Virginia Pharmacy*, the Court picked up Redish's argument in virtually every respect, including his explanations for why commercial speech, unlike political speech, could be safely regulated for its truth. Regulation of commercial speech for its truth Redish argued and the Court later held, was not as troubling as similar regulation in the political sphere would be because the economic motive made commercial speech hardier, that is, because companies had a powerful motive to communicate they would be unlikely to forego speech altogether even if it was regulated.⁷⁸ This move made it possible to extend the protection of the First Amendment to commercial speech while simultaneously leaving intact much consumer protection regulation.

Later, in *Central Hudson*,⁷⁹ the Court set out the four-part test for commercial speech still applicable today (albeit more strictly interpreted). In order to receive constitutional protection of the First Amendment under the commercial speech doctrine, the speech in question must (1) concern a legal activity and not be misleading (that is it must be truthful speech about a legal activity); (2) if the government seeks to regulate that speech it must do so pursuant to a "substantial interest"; (3) such legislation must directly further the substantial interest in question; and (4) the regulation must be no more expansive than necessary to advance that substantial interest (often described as "fit").⁸⁰ The test does not define what makes speech "commercial," although it is clear that such speech is only protected if it is truthful. The *Central Hudson* test, however, sets up something of a definitional quandary because if something is commercial it is protected only if it is truthful; but being truthful does not make it "commercial."

The Court in *Virginia Pharmacy* seemed to think, and Redish's article reflects much the same stance (although he has since expanded his definition), that "commercial speech" was "advertising,"⁸¹ since the

away with the criminal law altogether on the theory that doing evil will reap its own punishment. Similarly, it seems unwise to place too much reliance on the idea that fraud will not pay in the long run so that we need not spend resources attempting to deter it.

⁷⁸ Redish, *supra* note 75, at 458-59 (suggesting profit motive may be some insurance against the chilling effect of regulation of false advertising). Cf. *Virginia Pharmacy*, 425 U.S. at 771 n.24. Reading Professor Redish's article in tandem with the *Virginia Pharmacy* decision should offer cheer to those academics who despair of having influence on the courts. One cannot read these two without concluding that Redish persuaded the Court to adopt his theory. The Court also concluded that "[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than . . . [by] news reporting or political commentary . . ." *Id.*

⁷⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

⁸⁰ *Id.* at 566 (describing test).

⁸¹ Redish, *supra* note 75, at 432 ("The subject of inquiry . . . is the value to society of traditional commercial advertising of products and services the public purchases and uses

Court used these terms interchangeably.⁸² And at times the Court has suggested that what makes speech “commercial” is whether it was speech “propos[ing] a commercial transaction.”⁸³ But the Court quickly retreated from such simplistic definitions when, in subsequent cases, claims for protection involved material that could not be so easily categorized.⁸⁴ Nevertheless the Court has never clearly articulated an alternative definition, so many continue to allude to the “speech which does no more than propose a commercial transaction.”

C. Corporate Speech

At the same time the Court was crafting protection for speech that was “commercial” based on the nature of the speech and the rights of the listener to receive the speech, it was confronted with claims by corporations that they had the right to expend resources on political ads. In *First National Bank of Boston v. Bellotti*,⁸⁵ the bank petitioner claimed it had a First Amendment right to take out ads urging voters not to approve a personal income tax despite a Massachusetts statute that banned such expenditures by corporations unless they advanced the economic interest of the corporation.⁸⁶ The Court in *Bellotti* felt it necessary to observe that a corporation had First Amendment rights and that its contributions to political discourse were no less valuable because of the speaker’s corporate status as if it were self-evidently true.⁸⁷ But it actually had not been so self-evident prior to the *Bellotti*

regularly.”).

⁸² *Virginia Pharmacy*, 425 U.S. at 769-773 (using “advertising” and “commercial speech” interchangeably as if it were self-evident that advertising were equal to commercial speech).

⁸³ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973).

⁸⁴ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

⁸⁵ 435 U.S. 765 (1978) (national banks challenged constitutionality of a state statute that criminalized contributions or expenditures by corporations to influence the outcome of a vote on any question submitted to voters that did not materially affect the property, business or assets of the corporation).

⁸⁶ *Id.* at 770-72. As discussed further below, this limitation was arguably redundant since corporate law already may preclude expenditures which are not in the corporation’s economic interest as measured by the very capacious business judgment rule as breaches of fiduciary duty. Although the Court suggested that the First Amendment did not permit the government to tell a corporation to “stick to its business,” *id.* at 784-85, it did not comment on state statutes delineating the scope of corporate power and the duties to shareholders, which do just that insofar as they typically define the duty of the board and management, broadly speaking, as protecting shareholder financial interests. Presumably a claim could still be made in a shareholders’ derivative action that corporate spending for an apparently non-business purpose in a particular case was a misuse of corporate funds. However, the practical realities of the capaciousness of the business judgment rule and the procedural hurdles for shareholders suggest that in fact shareholders would have a difficult time maintaining such an action.

⁸⁷ This holding was reaffirmed in *Consol. Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*,

decision. However the Court's pronouncement there, combined with its holding in *Buckley v. Valeo*⁸⁸ that limitations on campaign expenditures constituted an unconstitutional limitation on speech, were to have far-reaching consequences.

This line of cases, unlike the commercial speech doctrine, seemed to situate squarely the corporation as a rights holder of expressive interests. And although the Court fairly quickly retreated from its most expansive extension of rights to for-profit corporations in *Bellotti* by later upholding various restrictions on corporations' ability to contribute to political campaigns and to spend money on ads,⁸⁹ it did not retreat all the way. So the two strands of case law have developed in an uneasy and confusing coexistence, with *Bellotti* often cropping up in the commercial speech arena as support for the notion of the corporation as protected speaker,⁹⁰ often with no mention of the later corporate speech cases or discussion of why, if the corporation is such a speaker, its expressive rights are limited in commerce in a way they are not limited in political speech or why some limitations based on status as a corporation have been deemed appropriate with respect to political speech.⁹¹ This history suggests the Court backed into the corporate speech formulation without fully considering the appropriateness of the corporate person as a rights holder under the First Amendment or the

447 U.S. 530, 533-34 n.1 (1980) (holding a publicly regulated utility had a First Amendment right to insert circulars into bills that contained arguments about nuclear power, and status as a regulated utility did not diminish the enjoyment of these rights).

⁸⁸ 424 U.S. 1 (1976).

⁸⁹ Federal Election Comm'n v. Mass. Citizens for Life, Inc. (MCFL), 479 U.S. 238 (1986) (distribution of not-for-profit organization's pro-life newsletter violated federal statute prohibiting direct spending by corporations in connection to elections to public office but the statute was unconstitutional as applied to MCFL); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) (holding state statute prohibiting corporations from using treasury funds for independent expenditures in support or in opposition to candidates for election to public office was not unconstitutional as applied to not-for-profit organizations where the not-for-profit organization was largely funded by for-profit entities, and organization was formed to promote activities other than simply advocacy).

⁹⁰ For example, many of the amici in *Nike v. Kasky* cited *Bellotti* for the proposition that the status of the speaker as a commercial entity was irrelevant for First Amendment purposes but did not cite *Austin* or other cases suggesting that this was not an unlimited principle. Brief of Amici Curiae the Association of Nat'l Adver., Inc. et. al in Support of Petitioners at 8, *Nike v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 835112; Brief of ExxonMobil et al. as Amici Curiae in Support of Petitioners at 9-13, *Nike v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 835523; Brief for the Nat'l Ass'n of Mfrs. as Amicus Curiae in Support of Petitioners at 12-13, *Nike v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 835884.

⁹¹ The limitations on corporations that were upheld in *MCFL* and *Austin* were further put into question by the Supreme Court's refusal to extend its reasoning in these two cases to a challenge in 2007 to limits on certain types of political advertising expenditures by corporations. Federal Election Comm'n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652, 2659 (2007). For further discussion of this issue in campaign finance as well as the bearing these questions have on corporate governance principles, see Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1 (2001).

possibility that there might be valid reasons to distinguish between human beings engaging in commercial speech and entities such as corporations.⁹² Although we could say that the corporate person has a “nature,” it may be more accurate to say that the rules governing the formation, organization, conduct, and powers of a for-profit corporation dictate that decision making within these organizations will tend to display certain characteristics or tendencies rather than a nature. Change the rules and the behavior may change as well. These rules bear examination in advance of reviewing the theoretical justifications for protecting freedom of expression because they suggest that freedom for these institutions may mean less freedom for others.

II. THE CORPORATE PERSON

Corporation, n.

An ingenious device for obtaining individual profit without individual responsibility.

—Ambrose Bierce, *The Devil's Dictionary*⁹³

If you open a newspaper in the United States these days it is difficult to escape the fallout from the last decade of corporate excesses. WorldCom. Enron. Arthur Andersen. Tyco. American International Group.⁹⁴ Citigroup agreed to pay a \$2 billion settlement in relation to its role in the Enron fiasco.⁹⁵ And as large as that amount seems, Citigroup may have gotten a bargain since, according to some observers, Citigroup's exposure could have been far greater than \$2 billion.⁹⁶ Other firms have yet to settle (or will probably have settled by the time this goes to press).⁹⁷ Some of the individuals associated with

⁹² The device of assuming a sort of Court consciousness when it is in fact made up of nine separate persons who not only have differing views, but whose own views may change over time, is as much a fiction as the notion that a corporation has an “opinion.”

⁹³ AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* 43 (Filiquarian Publishing 2007) (1911), available at <http://www.alcyone.com/max/lit/devils/c.html>.

⁹⁴ The Saturday, June 11, 2005, issue of the *New York Times* carried at least five stories related to corporate misconduct. See, e.g., Ken Belson, *Ebbers Pleads for Leniency in Sentencing*, N.Y. TIMES, June 11, 2005, at C13; Julie Creswell, *Citigroup Agrees to Pay \$2 Billion in Enron Scandal*, N.Y. TIMES, June 11, 2005, at A1; *Jurors in Trial of Two Tyco Executives End the Week Without Completing a Verdict*, N.Y. TIMES, June 11, 2005, at C2; *A Second Guilty Plea in A.I.G.-Related Case*, N.Y. TIMES, June 11, 2005, at C13.

⁹⁵ Creswell, *supra* note 94.

⁹⁶ *Id.* (“The potential exposure to the banks in this case could have been really large,” said Joseph A. Grundfest, a law professor at Stanford University and a former commissioner at the Securities and Exchange Commission. “It was not in the best interest of Citigroup to push the issue through to a jury verdict.”).

⁹⁷ See UC Secures \$2.2 Billion Settlement with J. P. Morgan Chase in Enron Fraud Case,

these failures, such as Bernard Ebbers,⁹⁸ former CEO of WorldCom, Dennis Kozlowski,⁹⁹ CEO of Tyco, and Ken Lay and Jeffrey Skilling, the two principal architects of the Enron fiasco, were convicted.¹⁰⁰ Yet, for many reasons, it appears that fundamental change has been elusive.

In response to spectacular failures like Enron, Congress passed the Sarbanes-Oxley Act in 2002.¹⁰¹ Sarbanes-Oxley was intended as a comprehensive reform of corporate governance principles and intended to prevent future failures like Enron, Tyco, and WorldCom.¹⁰² Yet, eleven years before Sarbanes-Oxley was passed, the United States Sentencing Commission made a similar bid to discourage corporate wrongdoing by revising the Sentencing Guidelines to provide tougher penalties for criminal wrongdoing by corporations.¹⁰³ These changes were intended to make scenarios like Enron less likely. However, a study published in 1999, in the *Journal of Law & Economics*, found that those enhancements had had little effect.¹⁰⁴ So, given the experience with these efforts, there is reason to be skeptical that Sarbanes-Oxley, by assisting in the unmasking of a “few bad apples”¹⁰⁵ in an otherwise

June 14, 2005, http://enronfraud.com/enr-cgi-bin/mil?templ=news/articles/jpmorgan_settlement.html (J. P. Morgan announced its agreement to settle and pay investors \$2.2 billion for damages arising out of the Enron failure).

⁹⁸ Krysten Crawford, *Ex-WorldCom CEO Ebbers Guilty*, CNN/MONEY.COM, Mar. 15, 2005, <http://money.cnn.com/2005/03/15/news/newsmakers/ebbers/>.

⁹⁹ Grace Wong, *Kozlowski Gets Up To 25 Years*, CNN/MONEY.COM, Sept. 19, 2005, http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski_sentence/.

¹⁰⁰ Mary Flood, Mark Babineck & John Roper, *Guilty! Guilty! Verdict Will Mean Prison for Ex-Enron Chiefs*, HOUSTON CHRONICLE, May 25, 2006, available at <http://images.chron.com/content/news/photos/06/05/25/extra1.pdf>.

¹⁰¹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 2002 U.S.C.C.A.N. (116 Stat.) 745 (codified in scattered sections of 15 and 18 U.S.C.).

¹⁰² See, e.g., Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005). For a somewhat more optimistic analysis of the potential of Sarbanes-Oxley to spur positive change, see Lawrence E. Mitchell, *The Sarbanes-Oxley Act and the Reinvention of Corporate Governance?*, 48 VILL. L. REV. 1189 (2003).

¹⁰³ U.S. SENTENCING GUIDELINES MANUAL § 8.

¹⁰⁴ Jeffrey S. Parker & Raymond A. Atkins, *Did the Corporate Criminal Sentencing Guidelines Matter? Some Preliminary Empirical Observations*, 42 J.L. & ECON. 423, 424 (1999) (“generally finding no significant effect”). Indeed, the authors speculated that if “the 1991 guidelines were never intended to do anything other than meet a demand for political rhetoric rather than law enforcement” their lack of impact may have been “the best of all possible worlds.” *Id.* at 449. From the title it is clear that the authors do not claim their observations are definitive. But they are suggestive and generally are consistent with the observations made by others quoted in this essay and by the arguments advanced here.

¹⁰⁵ In the film, *The Corporation*, inspired by the book of the same name, see *infra* note 112, the filmmakers collect news and commentary clips repeating the “few bad apples” motif as an explanation by President George W. Bush for why, despite Enron’s failure, the American economy was basically sound. *THE CORPORATION* (Big Picture Media Corporation 2003). See also *The Corporation* Film, <http://www.thecorporation.com/> (last visited June 14, 2007). Recent events with the subprime mortgage crisis may be seen as support for this claim to the extent that the crisis was not worse, or as undermining it because it occurred in the first place. I am inclined to agree with Paul Krugman that the Federal Reserve’s ability to head off a larger financial crisis does not mean that there are not good reasons to be concerned about the soundness of the

sound system, will solve the problems that precipitated organizational collapses like Enron.¹⁰⁶

In the first place the corporation is indifferent to the most severe aspect of criminal penalties—the loss of liberty. “Unlike individuals, corporations have neither ‘liberty’ nor ‘wealth’ to protect as such.”¹⁰⁷ And its representatives, who do have both liberty and wealth to protect, are partially shielded from responsibility by the laws governing corporations. The legal structure of a corporation often shields the flesh and blood actors in the corporation—shareholders, officers and directors, executives—from personal liability through legal doctrines, explicit incorporation documents, agreements, contracts of insurances and the like.¹⁰⁸ And in those circumstances where liability could theoretically attach to persons, corporate officers, directors and managers act within a collectivity¹⁰⁹ that diffuses both knowledge and responsibility such that no one person may really possess the sort of guilty knowledge that serves, in many minds, as a prerequisite for criminal liability and so, almost by definition, neither does the corporation.¹¹⁰ Undoubtedly, many of those executives who did find themselves convicted of a crime could say, along with former WorldCom accountant, Betty Vinson, “I never expected to be here.”¹¹¹

However, a corporation’s most potent weapon against enforcement

economy. Paul Krugman, *Success Breeds Failure*, N.Y. TIMES, May 5, 2008, available at <http://www.nytimes.com/2008/05/05/opinion/05krugman.html?r=1&scp=11&sq=may+05+2008&st=nyt&oref=slogin>.

¹⁰⁶ One possibility is to use the independent federal auditor who is appointed by the court in cases of deferred prosecution of corporations. See, e.g., Stephanie Saul, *A Corporate Nanny Turns Assertive*, N.Y. TIMES, Sept. 19, 2006, at C1 (discussing one such arrangement in an agreement between the SEC and Bristol-Myers Squibb).

¹⁰⁷ Parker & Atkins, *supra* note 104, at 427.

¹⁰⁸ See, e.g., JEFFREY D. BAUMAN ET AL., CORPORATIONS LAW & POLICY 1 (5th ed. 2003) (describing limited liability as one of the distinctive features of the corporate form). Under exceptional circumstances officers, directors and/or shareholders can be held liable for the debts or obligations of the firm where there are grounds for piercing the corporate veil. *Id.* at 318-365.

¹⁰⁹ For a description of the collective nature of the firm, see Daniel J. H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 1021-34 (1998).

¹¹⁰ In general it is difficult to hold a firm liable for violations where intent or state of mind is relevant. See, e.g., Stacey Neumann Vu, Note, *Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent*, 104 COLUM. L. REV. 459 (2004) (describing difficulties assigning *mens rea* where responsibility is diffused); see also Arthur Andersen L.L.P. v. United States, 544 U.S. 696, 705-09 (2005) (overturning conviction because jury instruction failed to adequately convey to jury the requirement of intent).

¹¹¹ Erin McClam, *WorldCom Figures Sentenced*, TULSA WORLD (Oklahoma), Aug. 6, 2005, at E6 (quoting Betty Vinson at her sentencing). Whether Ms. Vinson meant she was sorry and surprised because she had not started out to do wrong, or she simply meant she had not expected to get caught is not clear. But it may be fair to say that most corporate criminals have a better chance of succeeding than the average street criminal and certainly are more likely to have access to adequate or even exceptional representation, a factor which in turn may affect the likelihood of conviction. For a discussion of these and other issues making so-called “white collar crime” distinctive, see JAMES WILLIAM COLEMAN, *THE CRIMINAL ELITE: UNDERSTANDING WHITE-COLLAR CRIME* (5th ed. 2002).

efforts is its ability to assess every potential penalty through the lens of a cost/benefit, economic analysis and then to transfer the costs of penalties to others. Because the corporation's separate identity is more functional than it is real, no penalty assessed against a corporation is assessed *only* against the corporation (or maybe even at all). Instead, it is passed through the corporation to others: shareholders, employees, consumers, or the public at large. Moreover, when dealing with large, multinational corporations, those which have the potential for the greatest social impact, it is difficult to assess penalties that are large enough to be meaningful as punishment.

Take for example Citigroup's \$2 billion settlement of its liability in the Enron matter. This is not a small sum. But it also is not clear that it is a large enough sum to deter future officers and directors from engaging in similar conduct because there is no context.¹¹² Put another way, we cannot know whether Citigroup has been "punished" without knowing how much money it made on the transactions with Enron. If, for example, Citigroup had made a \$20 billion profit on the business with Enron, a \$2 billion reduction in that profit would still leave a healthy \$18 billion profit.¹¹³ And while we cannot assume that the specter of criminal sanctions or public relations scandals have *no* effect on deterring undesirable conduct (they undoubtedly have some effect), it still seems that profit is the primary motivating factor in corporate decision making. "For a corporation, compliance with law, like everything else, is a matter of costs and benefits."¹¹⁴ If the perceived benefits outweigh the perceived costs, Citigroup presumably will repeat what it did with Enron.

In fact, according to some, it may have a *duty* to its shareholders to do so.¹¹⁵ And the evidence suggests that while the past 10 years have

¹¹² See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* (2004) (describing profit motive as the single unifying aim of corporate behavior); see also David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 224.

¹¹³ The Sentencing Guidelines actually suggest that the profits from the crime may be a factor in assessing a punishment in the applicable range. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.8(b). Whether this factor is regularly assessed is a question not addressed in this essay, but the article by Parker & Atkins, *supra* note 104, suggests that the Guidelines do not matter much.

¹¹⁴ BAKAN, *supra* note 112, at 79.

¹¹⁵ Pursuant to the standard theory, firms are run for the benefit of shareholders. See, e.g., BAUMAN ET. AL., *supra* note 108, at 465. That theory could (but does not) require officers and directors to do everything *possible* to maximize the value of those stockholders' shares. However, the business judgment rule acts as a check on judicial imposition of a strict sort of "profit only" interpretation of management's duties. And judicial interpretation of the business judgment rule has been fairly deferential to management decision-making. For a lengthy discussion of why corporate law does not (and ought not) create a duty to maximize shareholder value to the exclusion of some limited profit sacrificing behavior, see Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005). For discussions of the shareholder primacy theory and a duty to enhance profits, as well as the argument that this position results in the best social outcomes, see Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440-41 (2001). For a comparison of the

included rather more extravagant corporate misconduct than some of the eras that immediately preceded it, the existence of corporate law-breaking in pursuit of profit is not only not anomalous, it is endemic.¹¹⁶ The choice to breach and pay damages may be an efficient strategy in contract regimes, but when it comes to issues touching on the public health, the environment, and investor confidence, a decision to incur a fine in order to engage in the conduct sought to be deterred may not be an optimal one for society as a whole, even if it is for the company in question.¹¹⁷ The catalog of ways in which corporate misconduct has contributed to social ills—environmental pollution, harmful products, lost pensions, and so forth—seems sufficiently obvious to negate the question of whether there is a problem.¹¹⁸ There is no question there is a problem; the question is what to do about the problem.

While many observers of the past decade's corporate misconduct focus their attention on the ethical issues, recalibrating executive compensation, or possible changes to the corporate structure and accounting rules for preventing future "Enrons,"¹¹⁹ too little attention has been paid to a key factor making scenarios like Enron possible—corporate communications. Enron's management systematically failed to communicate important facts that investors, employees, and the public might want to know while simultaneously flooding the market with ersatz "information" designed to package, promote, and "sell" the public on its own version of the corporation's worth.¹²⁰ It could do this

development of differing norms on this issue as between the U.S. and Europe, see Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063 (2001). Of course there is never a fiduciary duty to break the law. The problem is that it is often unclear that the law has been broken until after the fact.

¹¹⁶ For example, see the four-page list of criminal and civil violations committed by General Electric between 1990 and 2001 in Joel Bakan's study of the corporation. BAKAN, *supra* note 112, at 75-78. See also Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, CORPORATE CRIME REPORTER, <http://www.corporatecrimereporter.com/top100.html> (last visited Apr. 7, 2008) (the list includes many of the FORTUNE 500 companies); Editorial, *Corporate Crime and Punishment*, 26 MULTINATIONAL MONITOR, Nov.-Dec. 2005, available at <http://www.multinationalmonitor.org/mm2005/112005/editorial.html> ("Does corporate crime pay? Increasingly, not only does it pay, it's not even prosecuted—not even when the corporate crime cops have the goods on the bad guys.").

¹¹⁷ Of course it is possible that it is as good as it gets. It is not at all clear that the availability of punishments like imprisonment acts as a deterrent that is as meaningful as we might like to think it is.

¹¹⁸ Antisocial conduct is arguably a problem that the criminal law does not adequately address in any context. That argument is beyond the scope of this Article. However, large multinational corporations with resources exceeding that of many countries clearly can do damage on a larger scale than most individuals or even explicitly criminal syndicates could ever image in their wildest dreams.

¹¹⁹ See ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS, *supra* note 27 (collected essays discussing how Enron happened and offering some proposals for reform).

¹²⁰ See Jeffrey D. Van Niel & Nancy B. Rapoport, *Dr. Jekyll & Mr. Skilling: How Enron's Public Image Morphed from the Most Innovative Company in the Fortune 500 to the Most Notorious Company Ever*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS, *supra*

because of a legal environment in which duties to disclose are sometimes ambiguous and may be laxly enforced (even in the absence of an intent to deceive), while there is, in contrast, virtually unbridled freedom for corporate speech that takes the form of marketing and public relations.¹²¹ Frank Rich, media columnist for the *New York Times*, claims that it was public relations propaganda that propped up Enron's "house of cards."¹²² An intensive spin campaign may explain how the company managed to convince investors, the financial media,

note 27, at 77-94 (describing public relations success); Frank Rich, *Enron: Patron Saint of Bush's Fake News*, N.Y. TIMES, Mar. 20, 2005, §2, at 1 (detailing some of the public relations exercises that created the image that Rapoport and Van Niel describe).

There may be good reasons to think that organizational culture, and perhaps Enron's in particular, encourages undue optimism in its actors. For a general discussion of the ways in which the context of an organization, common cognitive strategies such as optimistic bias, and the like may either lead to inadequate information or predispose managers to interpret such information they have in an overly optimistic fashion or engage in concealment, see Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 101 (1997). Professor Langevoort's discussion offers convincing grounds for believing that individuals such as Jeffrey Skilling may not necessarily have intentionally engaged in wrong doing because a variety of cognitive biases, including the optimistic bias, cloud managers' perceptions. "[T]hese cognitive biases are the primary explanation for a host of suboptimal strategic decisions of the type chronically observed in industry: overbidding for assets, plant overexpansion, and foolish entry into new lines of business." *Id.* at 140. See also FINE, *supra* note 63, at 111 ("Twisting information and self-censoring arguments—strategies we unconsciously use to keep the balance of evidence weighing more heavily on our own side of the scales—keep us buoyantly self-assured.").

Whether these biases are the primary explanation is perhaps debatable. But their existence is plausible and is corroborated by some of the facts. These factors may affect the moral weight given to the actions of these individuals. And perhaps it should affect the availability or the application of criminal sanctions. Nevertheless, we are left with the dilemma of how to minimize the damage from these somewhat predictable psychological strategies. Given the phenomena Professor Langevoort discusses, it seems even less likely that broad Constitutional protection for commercial or corporate speech will ameliorate the problem. To the contrary, it seems rather likely to exacerbate it.

¹²¹ I have addressed the argument for including public relations as commercial speech in greater detail in an earlier article. See Tamara R. Piety, *Free Advertising: The Case for Public Relations as Commercial Speech*, 10 LEWIS & CLARK L. REV. 367 (2006). The present essay focuses on the correspondence, or lack thereof, between theories of protection for speech under the First Amendment and the theories and realities of corporate personhood.

¹²² Rich, *supra* note 120. One example of such P.R. efforts was the infamous tour Enron executives gave financial analysts of Enron's newly launched EES division in 1998. The analysts were taken to the 6th floor in Enron's headquarters.

There, they beheld the very picture of a sophisticated, booming business: a big open room, bustling with people, all busily working the telephones and hunched over computer terminals, seemingly cutting deals and trading energy. Giant plasma screens displayed electronic maps, which could show the sites of EES's many contracts and prospects. Commodity prices danced across an electronic ticker. "It was very impressive," recalls analyst John Olson, who, at the time, covered the company for Merrill Lynch. "It was a veritable beehive of activity."

It was also a veritable sham. The war room had been rapidly fitted out explicitly to impress the analysts.

BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* 179-80 (2003).

and the public at large that it was spectacularly successful, despite little in the way of factual support for its claims of profits and many good reasons for skepticism.¹²³

“Spin,” how a story plays, and the “spectacle” are all-important considerations in influencing behavior of all kinds: consumer, political,¹²⁴ and personal. Corporate speakers attempt to manage these impressions with massive expenditures for speech of all kinds.¹²⁵ And while they may *sometimes* be truthful and informational, they are *always* promotional. So we can expect that this speech will systematically exclude negative truthful information. Given the structure of the for-profit corporation, the diffusion of responsibility and the pressure on a corporation’s human representative to subsume complex personal and political goals into a single goal for the corporation—profit enhancement—there is little reason to expect the corporation to disclose information that might be harmful to it, absent a legal duty to do so. Yet even when there is such a duty there is some reason to believe that the disclosures, when made, are not as effective as the law presumes they are¹²⁶ any more than the existence of a duty

¹²³ Enron’s continuing to post profits despite being unable to show how it generated them, and in spite of a refusal to offer balance sheets and cash flow statements, led some observers to refer to it as a “black box.” MCLEAN & ELKIND, *supra* note 122, at 320-21. At least one commentator makes a similar criticism of the Tyco collapse. See Jeff Matthews, This Just In: “Spin” Becomes “Lying,” Jeff Matthews is Not Making This Up, <http://jeffmatthewsisnotmakingthisup.blogspot.com/2005/06/this-just-in-spin-becomes-lying.html> (last visited June 19, 2005).

¹²⁴ How else to explain widespread apathy with respect to the failure to find WMD (weapons of mass destruction) in Iraq? One of the most blatant examples of marketing language infiltrating the political sphere is the explanation President Bush’s Chief of Staff Andrew Card gave for the timing of the Iraq war invasion: “You don’t introduce new products in August.” George Packer, Comment, *Name Calling*, THE NEW YORKER, Aug. 8, 2005, at 33.

¹²⁵ Throughout this article when I refer to “corporations” I principally mean large, publicly traded, for-profit corporations. But much of what I say here *could* be applied to any form of relatively large business organization—the partnership, the LLC, or any variation thereof. If of sufficient size, even a close corporation may have widespread impact on the tenor and type of speech in the market. Could be, but not necessarily. Analysis of other business forms is beyond the scope of this article.

¹²⁶ See, e.g., Langevoort, *supra* note 120, at 141 (“[A] ‘can-do’ culture built on . . . adaptive biases will prize dismissal of risk and reject any effort to accept and acknowledge their seriousness publicly. . . . Such belief systems may not easily tolerate forms of publicity or disclosure that are at odds with the corporate self-image.”); Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law From Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627 (1996) (discussing paradox of paying for investment advice given brokers clear conflict problems and research that suggests buyers often do not read prospectuses because of reliance on brokers); Howard A. Latin, “Good” Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193, 1211-14 (1994) (discussing information overload, which although raised in Latin’s article in the context of tort, is probably a significant ground for concern in the securities market as well). For a general discussion of some communications problems in market information for consumers, see Jon Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999), and Jon Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999).

under the law guarantees that disclosures will in fact be made. However, when the absence of important disclosures is combined with the proliferation of salient, appealing misinformation, it seems difficult to conclude that no harm has been done.

These observations may be fairly unexceptional. Enron's officers lied, and that happens sometimes. The law may not be a very effective deterrent to intentional wrongdoing. However, the importance of the misrepresentations is that they take place at a time when large, multinational corporations are seeking greater constitutional protection for speech, that is—broadly speaking—marketing speech, and, as is explored below, they seem poised to get it.¹²⁷ Before additional protection is extended to for-profit, promotional corporate speech, it pays to examine its role in contributing to these massive market failures¹²⁸ and threats to public health and welfare.

Since the 1970s, governmental regulation of commercial speech, particularly in the form of advertising, has come under increasing scrutiny as a burden on freedom of expression.¹²⁹ While it is difficult to

¹²⁷ The recent *Nike v. Kasky* case suggested that a majority of the members of the Supreme Court seemed inclined to think that fairness and equal time for all viewpoints required that Nike's "viewpoint" be given constitutional protection, lest its communication be unduly "chilled." 539 U.S. 654 (2003). Although the Supreme Court did not decide the commercial speech issues presented because the Court dismissed the case on jurisdictional grounds, both the concurring and dissenting opinions in that decision suggested that several members of the Court found Nike's arguments persuasive. Justice Stevens' opinion concurring in the dismissal, which was joined by Ginsburg and Souter in the relevant part, *see Nike*, 539 U.S. at 656 (Stevens, J. concurring), reflects a concern for the potential "chilling effect" if Kasky's lawsuit was able to go forward; a concern that presumes that corporations offer valuable input in this context and that overlooks the significance of the demurrer that meant Nike was effectively asking for constitutional *carte blanche* to engage in intentional deception. *See Piety, supra* note 9. Kennedy dissented without opinion, but in an opinion in an earlier case he suggested that, in his view, the *Central Hudson* test was insufficiently protective of "truthful, nonmisleading commercial speech." *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Kennedy, J., concurring). Justice Scalia joined Justice Kennedy in this opinion. Justice Breyer wrote a dissent in *Nike* from the decision to dismiss, indicating he would have preferred to decide the *Nike* case. 539 U.S. at 665 (Breyer, J., dissenting). His opinion, joined by Justice O'Connor, left little doubt that he generally supported Nike's argument. He appeared to agree that allowing Kasky's lawsuit to proceed would have a "chilling effect" on future speech. Justice Thomas has straightforwardly announced his support for treating advertising speech like political speech. *See, e.g., Lorillard Tobacco Co.*, 533 U.S. at 572 (Thomas, J., concurring) ("I would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment."). By my count, even excepting Justice O'Connor and taking account in the changes in the make-up of the Court, this suggests that a majority of the Court is receptive, at least in part, to arguments such as Nike advanced.

¹²⁸ By "market failures" I do not necessarily mean the term in the same way an economist would. I am referring to massive business failures.

¹²⁹ *See Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 758-60 (1976) (discussing the historical movement of the Court's decisions to greater protection for commercial speech). *See also* ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 25-69 (2003) (discussing history of freedom for commercial expression in the United States); Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist's Recollections*, 54 CASE W. RES. L. REV. 1189 (2004) (discussing the context in which Virginia Pharmacy was argued by one of the Consumer Council's lawyers). It could be argued that commercial speech as

identify the cause for the parallels, during that same period corporations have pressed for and increasingly obtained greater roles in politics in the form of contributions to candidates or causes,¹³⁰ the formation of political action committees or other groups to lobby on their behalf,¹³¹ and the practice of proposing legislation designed to address their interests.¹³² A key component on which this trend has been built is the notion of the corporation as a “person”¹³³—a person with rights to

a category did not exist until the *Virginia Pharmacy* Court created it.

¹³⁰ See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (extending First Amendment rights to corporations' expenditures for advertising that related to political lobbying). But see *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (retreating from *Bellotti* to the extent that *Bellotti* suggested no distinction between human and corporate speakers and maintaining that corporations were creatures of the state and enjoyed certain advantages pursuant to law that human beings did not, advantages that may at times justify corresponding restrictions not applicable to people); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530 (1980).

¹³¹ See, e.g., JOHN C. STAUBER & SHELDON RAMPTON, *TOXIC SLUDGE IS GOOD FOR YOU!* (1995) (describing influence of public relations lobbying, primarily, but not exclusively, on behalf of business interests). For a similar description of the influence of PR in Canada, see JOYCE C. NELSON, *SULTANS OF SLEAZE* (1989).

¹³² For example, the recent reforms of the bankruptcy laws, making it more difficult for individuals to declare bankruptcy were largely written by the credit card industry for its own benefit to make it more difficult to discharge credit card debt. See, e.g., Michael Schroeder & Suein Hwang, *Revised Chapters: Sweeping New Bankruptcy Law to Make Life Harder for Debtors; After 8 Years, Legislation Finally Nears Passage; No Limits on Card Giants; A Day Trader's Bills Come Due*, WALL ST. J., Apr. 6, 2005, at A1. “On April 20, President Bush signed what has been termed the biggest rewrite of U.S. bankruptcy law in a quarter century. The bill, titled the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Bill”), takes direct aim at the ability of consumers to discharge their debts through Chapter 7 Liquidation and Chapter 13 Reorganization by making the process more difficult and more expensive for consumers.” Michael J. Davis, *The New Bankruptcy Code: Goodbye Consumer Chapter 7 Cases*, 17 DCBA BRIEF 16 (2005). See also Elizabeth Warren, *The Over-Consumption Myth and Other Tales of Economics, Law, and Morality*, 82 WASH. U. L.Q. 1485, 1507-11 (2004) (noting the industry's role in obtaining bankruptcy law revisions that, according to Professor Warren, shift the issuer's responsibility to do adequate credit reviews onto the publicly funded courts and attributing the popularity of what she describes as the “over-consumption myth” as the product of “public relations campaigns and vote buying”); Elizabeth Warren, Op-Ed., *Show Me the Money*, N.Y. TIMES, Oct. 24, 2005, at A21 (describing banks' role in lobbying for the bankruptcy law revisions).

¹³³ Initially corporations were thought to have only those rights that were explicitly granted to them. See *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636-37 (1819). However, in the late nineteenth century the Court began shifting to the view that corporations were “persons” for purposes analyzing some rights. This shift is commonly attributed to the Court's decision in *Santa Clara Co. v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886). “Thus, the Court converted an amendment primarily designed to protect the rights of blacks into an amendment whose major effect, for the next seventy years, was to protect the rights of corporations.” Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW* 256 (David Kairys ed., 1982). For an excellent discussion of the history of the development of corporate theory, as well as an argument that what Justice Field meant by corporate personhood in 1886 is significantly different from the natural entity theory that later developed, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870-1960* 65-107 (Ch. 3, *Santa Clara* Revisited: The Development of Corporate Theory). See also WILLIAM A. KLEIN & JOHN C. COFFEE, *BUSINESS ORGANIZATION AND FINANCE* 112-17 (9th ed. 2004) (discussing the development of current doctrine); TED NACE, *GANGS OF AMERICA* (2003) (describing the rise of corporate power); ARNOLD, *supra* note 15, pp 185-206 (Chapter VIII—The Personification of Corporation).

freedom of expression equal to those of human beings.¹³⁴

This trend to push for corporate rights paralleling those of human beings is not one limited to the United States. It is global. At least, the same trend is discernable in Canada and Europe.¹³⁵ For example, corporations have sought protection under the guarantees for human rights in the European Union arguing that restrictions on advertising are violations of the right of freedom of expression set forth in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹³⁶ Given that some European countries have laws regulating advertising which are significantly more restrictive than U.S. law,¹³⁷ it

¹³⁴ See, e.g., Brief for ExxonMobil et al. as Amici Curiae Supporting Petitioners, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 835523 at *2 (“Nike’s speech and speech by corporations on other matters of public concern merit the highest level of First Amendment protection.”). One might expect such positions from commercial entities. More surprising were the statements of support from organizations like the ACLU and the Thomas Jefferson Center for the Protection of Freedom of Expression. Both entities filed briefs in support of the proposition that freedom for corporate speech was an essential component of freedom of speech for all. See Brief for the American Civil Liberties Union & the ACLU of Northern California as Amici Curiae Supporting Petitioners, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 721563 (arguing that a lawsuit by a California activist charging that Nike had issued false statements in its press releases infringed on the First Amendment rights of Nike); Brief for the Thomas Jefferson Center for the Protection of Free Expression & the Media Institute as Amici Curiae Supporting Petitioners, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 1192678.

¹³⁵ See SHINER, *supra* note 129, at 70-93, 94-110 (describing similar moves to greater protections for commercial expression in Canada and Europe respectively).

¹³⁶ See, e.g., 2003 O.J. (C 289) 57 (Notice by Kreuzer Medien GmbH against the European Parliament and the Council for the European Union challenging the regulation of tobacco products as “infring[ing]” on “the freedom of expression safeguarded by Article 11 of the Charter of fundamental rights of the European Union and Article 10(1) of the ECHR”). Attempts to limit the governmental regulation of products causing health risks have met with mixed success. See, e.g., *Germany v. European Parliament*, 2000 E.C.R. I-8419, para. 175 (“I conclude, therefore, that the Advertising Directive does not constitute a disproportionate restriction of freedom of expression in so far as it imposes a comprehensive prohibition on the advertising of tobacco products.”). See also Press Release, E.C.J., Advocate General Fennelly Proposes That the Court of Justice Annul Directive on the Advertising and Sponsorship of Tobacco Products (June 15, 2000), available at <http://curia.europa.eu/en/actu/communiqués/cp00/aff/cp0045en.htm>.

Although the effect of decisions such as this one is ambiguous, see Benjamin Apt, *On the Right to Freedom of Expression in the European Union*, 4 COLUM. J. EUR. L. 69, 86-87 (1998) (“The legal status of the Convention in the EU has [] been perpetually ambiguous.”), such decisions are instructive because they help to shape public perceptions. For an overview of the approach to commercial speech in Canada and Europe, see SHINER, *supra* note 129, at 70-116.

¹³⁷ For example, Sweden prohibits advertisements targeting children under the age of twelve. Lennart Lindström & Mårten Stenström, *Sweden*, in THE EUROPEAN HANDBOOK ON ADVERTISING LAW 775, 789 (Lord Campbell of Alloway & Zahd Yaqub eds., 1999) (citing 6 ch. 1(b) § Radio-och TV-lagen (SFS 1996:844) (“advertising must not be targeted at children below the age of 12”)). British regulators recently “introduced new rules barring depictions of links between sex and drinking in alcohol advertisements.” Eric Pfanner, *No Hunks in the Alcohol Advertisements, Please, We’re British*, N.Y. TIMES, Aug. 1, 2005, at C4. However, such bans might be difficult to implement in practice. As the former Deputy Director of the FTC has recently remarked in a symposium, “[W]e had trouble tailoring a regulation that would prohibit ads only in programs watched by young children because, it turns out there aren’t any programs just watched by very young children; audiences are all intermixed together.” Tracy Westen,

seems likely that if the EU continues on this path of accepting arguments that commercial speech by corporations is entitled to protection as a human right, it might eventually pose a threat to the continued viability of those regulatory efforts.¹³⁸

The question is: Why should corporations have human rights?¹³⁹ Protecting for-profit corporations as “persons” undermines the notion that either human beings possess certain rights because they are ends in themselves, or that the status of human being deserves special solicitude and protection by and from government.¹⁴⁰ Nevertheless, the argument that corporations are “speakers” with speech rights of all kinds is one with enormous rhetorical power. By claiming expressive rights, corporations invoke cherished notions of autonomy, freedom, and fairness.¹⁴¹

Behind the respect traditionally given in liberal democratic thought

Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy, 39 LOY. L.A. L. REV. 79, 85 (2006).

¹³⁸ Of course it may be that other countries will be just as likely to reject an argument that has convinced the courts in the U.S. Although U.S. law presumably has influence simply because of its power (both market power and political power) it is by no means universally admired or copied in every respect. Moreover, there is no clear analog to the First Amendment in most other economically advanced democratic systems.

¹³⁹ Many of the arguments I advance here, or some version thereof, were first proposed by others, including but not limited to, professors Daniel Greenwood, Roger Shiner, Joel Bakan, and C. Edwin Baker. See Greenwood, *supra* note 109; SHINER, *supra* note 129; BAKAN, *supra* note 112; C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 CASE W. RES. L. REV. 1161 (2004) [hereinafter Baker, *Paternalism*]; C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS (1994) [hereinafter BAKER, ADVERTISING].

¹⁴⁰ There are several philosophical roots for this position but one of the most pertinent for purposes of constitutional analysis comes from John Locke and his observations in the *Second Treatise on Government* that human beings have equal rights to “life liberty, health and property,” an observation which was clearly influential on the Framers. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 6 (1689). Another proponent of the position of human beings as having special status is ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

¹⁴¹ However, it is worthwhile to take extravagant statements about the deep commitment to freedom of speech with a grain of salt, given that there is very little of such freedom in the workplace (that is, if one wants to keep his job). Furthermore, work is where a number of citizens spend most of their waking hours. An analysis of the way in which employers are able to punish speech with which they disagree suggests that as a society, or at least in law, deference to property mostly trumps deference to freedom of speech. See, e.g., *Bushko v. Miller Brewing Co.*, 396 N.W.2d 167 (Wisc. 1986) (at-will employee had no wrongful discharge claim on grounds that his discharge had been connected to speech on matters of public concern). See also Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101 (1995); Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 CARDOZO L. REV. 729 (1989). Moreover, there is some evidence that the whistleblower protection provisions of Sarbanes-Oxley have not proven particularly effective.

Three years ago, the Sarbanes-Oxley Act was signed into law and hailed as a safety net for employees who stepped forward and revealed wrongdoing at their companies. But of the hundreds of people who lost jobs and filed complaints since the act was passed, only two are actually back at their jobs.

Jayne O'Donnell, *Blowing the Whistle Can Lead to Harsh Aftermath, Despite Law*, USA TODAY, Aug. 1, 2005, at 1B.

to freedom of expression as an ideal lies an attractive picture of human beings as autonomous choosers, and of human flourishing as relying on freely chosen sociality. The corporate domination of both the real market and the market-place of ideas defaces this attractive picture.¹⁴²

There are few signs that the trend to extend greater expressive rights to corporations is slowing. If anything, it appears to have gained ground with the *Nike v. Kasky* case.¹⁴³

The issue in *Nike* was whether Nike could be held liable if its statements concerning its labor practices were false.¹⁴⁴ What Nike tried to obtain in the lower courts (although it retreated from this position before the Supreme Court) was the freedom to say whatever it deemed in its best interest without any liability should some of its statements later be deemed false, even if the false statements were made with knowledge that they were false.¹⁴⁵ In the Supreme Court Nike claimed that because its statements were made in the form of public relations speech and contained arguments about globalization, its statements were opinions on matters of public concern that ought to be protected as political speech and their truth or falsity tested under a *New York Times v. Sullivan*¹⁴⁶ actual malice standard.¹⁴⁷ It argued that the actual malice standard was appropriate in order to ensure balance in debate on matters of public concern.¹⁴⁸

Apart from the interesting challenge posed by the requirement that plaintiff demonstrate corporate schizophrenia by proving Nike's statements about itself were made "with actual malice,"¹⁴⁹ what this

¹⁴² SHINER, *supra* note 129, at 3. A parallel issue, not dealt with in this article, is whether multinational corporations ought to observe standards of conduct with respect to human rights similar to those imposed on governmental actors. See, e.g., Benjamin C. Fishman, *Binding Corporations to Human Rights Norms Through Public Law Settlements*, 81 N.Y.U. L. REV. 1433 (2006).

¹⁴³ 539 U.S. 654 (2003).

¹⁴⁴ I have analyzed this aspect of Nike's claim in some detail in an earlier piece. See Piety, *supra* note 9. For a somewhat different angle on this case see David C. Vladeck, *Lessons From A Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049 (2004). Indeed, anyone interested in the *Nike* case should read all of the articles in the Case Western Reserve Law Review symposium issue on the case. Symposium, *Nike v. Kasky and the Modern Commercial Speech Doctrine*, 54 CASE W. RES. L. REV. 965 (2004).

¹⁴⁵ See, e.g., Deborah J. La Fetra, *Kick it Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1210 (2004).

¹⁴⁶ 376 U.S. 254 (1964).

¹⁴⁷ See Brief for the Petitioners at 43, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 898993.

¹⁴⁸ *Id.* at 44-45 (contending that some erroneous statement in speech is inevitable and protection must be given to that error).

¹⁴⁹ It is, as noted above, difficult to attribute any "state of mind" to a legal fiction, let alone a disordered state of mind. But a corporation might have a better basis for a claim to something like multiple personality disorder to the extent that there are several people "in there" in the corporate "mind." Joel Bakan claims that pursuant to the criteria in the DSM-IV the corporation is a psychopath. BAKAN, *supra* note 112, at 56-59 (corporations are "singularly self-interested")

argument elides is that because Nike's views are organized around the corporate imperative of profit, its expression is always marketing and thus not opinion in the usual sense of the word.¹⁵⁰

For-profit corporations adopt the opinions and positions their managers think are most congenial to business operations.¹⁵¹ "[A]ny speech financed by a for-profit corporation, if it is not a misappropriation of corporate funds, is commercial in that the only legitimate criterion for deciding to fund the speech is whether it serves the commercial interests of the company."¹⁵² Moreover, Nike's resources devoted to communication are such that only the willfully blind could claim it had not had ample, indeed disproportionate, opportunity to air its views so that "balance" hardly seems to require that it be insulated from liability for false statements.¹⁵³ Also, the structure of corporate purpose and the social context in which it takes place runs a perhaps larger than ordinary risk that corporations will suppress truthful speech where it appears disclosure would interfere with its business objectives.¹⁵⁴

Of course, there is no more reason to presume that corporations will generally be truthful any more often than human beings are. However, unlike human beings, corporations are not ends in themselves but institutions created to further human aims.

and display attributes that map diagnostic criteria for psychopathy). However useful this is as an insight into the ways in which the laws governing corporations may systematically generate antisocial behaviors, I am not sure we want to go down this path. It seems to be taking anthropomorphism a step too far.

¹⁵⁰ "Unlike groups of citizens, who must always debate the proper and shifting balance of conflicting values, corporations will pursue a single value to the detriment of all others." Greenwood, *supra* note 109, at 1051. "There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value." Hansmann & Kraakman, *supra* note 116, at 439. For a critique of the notion that this state of affairs is unproblematic because a broader than ever class of persons own stock, primarily through pension funds, see Paddy Ireland, *Shareholder Primacy and the Distribution of Wealth*, 68 MOD. L. REV. 49 (2005). See also EDWARD N. WOLFF, *TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT* (2002).

¹⁵¹ One vivid illustration of the nature of corporate speech is the report in *The New York Times* of an increase in corporate political contributions to the Democratic Party. Jeff Zeleny & Aron Pilhofer, *Democrats Get Late Donations From Business*, N.Y. TIMES, Oct. 24, 2006, at A1. These contributions are presumably made in the hopes of preserving influence and audiences, not out of any change in political viewpoints. Indeed, desire for influence, not principles, surely explains why so many corporate donors regularly contribute to both parties.

¹⁵² Bennis, *supra* note 4, at 395 (emphasis added).

¹⁵³ For example, in the *Nike* suit, the plaintiff, Kasky, alleged that in 1997 Nike spent "almost \$1 billion" on advertising and promotion. Amended Complaint at 5, *Kasky v. Nike, Inc.*, 539 U.S. 654 (2003) (No. 994446).

¹⁵⁴ It is always possible, perhaps even likely (although I could not say this is true as an empirical matter), that responsible corporate managers might conclude that suppressing negative truthful information will result in a short term gain at the expense of a longer run cost and that therefore the best strategy is full disclosure rather than an attempt to obfuscate, spin or otherwise cover-up negative information.

Legitimacy [of an organization] means that no arrangement of relations or of power recognized in law should be treated as an end in itself or as autonomous. An institution must be legitimated by its utility to some chosen end other than its own perpetuation. An institution which wields practical power—which compels men's wills or behavior—must be accountable for its purposes and its performance by criteria not wholly in the control of the institution itself.¹⁵⁵

A key issue in the Enron and WorldCom fiascos, and many others of the corporate rogue's gallery, was whether these organizations, or rather, the people speaking on their behalf, told the truth—whether they disclosed what needed to be disclosed or made statements intended to mislead investors (or others who might be expected to rely on their statements). If Nike had gotten what it wanted, a constitutional shield for false statements, would Sarbanes-Oxley matter?¹⁵⁶ Or would a constitutional defense be available which would trump any legislative intervention?

The proponents of freedom for commercial expression claim that such protection is needed because without it public debate will be unbalanced: one speaker will be unduly chilled.¹⁵⁷ This presumes it is not unbalanced already. But given the incentive structures discussed, the danger in extending such expansive protection to for-profit corporations is that massive amounts of false speech will be injected into the market without any clear checking force and that such protection, combined with robust protection for intellectual property such as trademark and copyright law, along with the application of notions of defamation and libel to corporations, will result in imbalance and chilling of debate in the other direction.¹⁵⁸ Indeed, one might plausibly argue that the current state of affairs is imbalanced in favor of corporate speech even without expansive First Amendment protection for commercial speech simply on the basis of the disparity of resources available. The infamous “McLibel” case in the U.K. is an example of this problem and offers a window into what we might expect if U.S. law

¹⁵⁵ JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* 58 (1970).

¹⁵⁶ Some observers have argued that Sarbanes-Oxley is mostly not responsive to fixing the problems that led to the Enron fiasco and that many of its provisions are likely to do little to advance the goal of greater corporate responsibility. See, e.g., Romano, *supra* note 102.

¹⁵⁷ Fred Schauer has described the doctrine of chill as part of the substantive ordering of values under the First Amendment as it implies the inevitability of error and a preference that those errors run in favor of protecting more speech. See Frederick Schauer, *Fear, Risk and the First Amendment. Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685 (1978).

¹⁵⁸ See LAWRENCE SOLEY, *CENSORSHIP, INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES* (2002). Soley's treatment is more comprehensive than this piece in that he discusses the control of employee speech and the employment of SLAPP suits (Strategic Lawsuits Against Public Participation).

were to be reformed to be as solicitous of libel for a corporation as the law in the U.K.¹⁵⁹

The “McLibel” case began when McDonald’s sued two impecunious members of London Greenpeace¹⁶⁰ for libel because of their distribution of leaflets that protested a number of McDonald’s business practices, primarily related to environmental impact, labor practices, and nutrition. McDonald’s initially sued members of London Greenpeace after having put the group under surveillance by private investigators for several months, surveillance that included infiltration of its meetings.¹⁶¹ Under the threat of liability pursuant to Britain’s very plaintiff-protective libel laws, McDonald’s extracted apologies and retractions from three members of the group.¹⁶² However, members Helen Steel and David Morris refused to apologize, so McDonald’s sued them. Steel and Morris were too poor to hire lawyers, and they were clearly not economic competitors of McDonald’s,¹⁶³ yet McDonald’s saw fit to launch what became, at the time, the longest running trial in English history¹⁶⁴ in order to, as its representatives put it, “stop people telling lies.”¹⁶⁵

Not every speaker has the kind of resources that McDonald’s has to “stop people telling lies,” or, perhaps more accurately, to promote and enforce its version of the truth. And when the lies in question may cause widespread social harm, for example with respect to a product like tobacco,¹⁶⁶ it is difficult to see where a matching force for counter

¹⁵⁹ See The McLibel Trial, <http://www.mcspotlight.org/case/index.html> (last visited Aug. 27, 2005). A feature-length documentary was recently released about the case. See MCLIBEL: THE POSTMAN AND THE GARDNER WHO TOOK ON MCDONALD’S, available at <http://www.spannerfilms.net/?lid=161> (last visited Aug. 27, 2005).

¹⁶⁰ The organization London Greenpeace was not affiliated in any way with Greenpeace, the more well known organization.

¹⁶¹ See The McLibel Trial: Story, <http://www.mcspotlight.org/case/trial/story.html> (last visited Aug. 27, 2005).

¹⁶² McDonald’s had earlier extracted apologies and retractions from some media organizations which had reproduced the leaflet or discussed the claims. *Id.*

¹⁶³ *Id.*

¹⁶⁴ “McLibel” Pair Win Legal Aid Case, BBC NEWS UK EDITION, Feb. 15, 2005, available at http://news.bbc.co.uk/2/hi/uk_news/4266209.stm.

¹⁶⁵ Statement distributed by McDonald’s Restaurants, Ltd. via leaflets in McDonald’s restaurants in London in April and May of 1994, explaining why it was suing Steel and Morris, available at http://www.mcspotlight.org/case/pretrial/factsheet_reply.html (last visited Nov. 8, 2006). It appears McDonald’s management was not confident that the marketplace of ideas would sufficiently sort out who was telling lies. Apparently McDonald’s is not interested in hearing from critics, although in its Corporate Responsibility Report McDonald’s notes that, “*In order to be successful as a business, we must listen.*” MCDONALD’S WORLDWIDE 2006 CORPORATE RESPONSIBILITY REPORT 12, available at <http://www.mcdonalds.com/corp/values/report/printable.html> (emphasis added).

¹⁶⁶ For example, in one study researchers found that there was a significant correlation between exposure to tobacco marketing other than traditional advertising, such as product placement, promotional displays and the like, and the initiation of tobacco use despite existence of fairly broad restrictions on tobacco advertising, suggesting to the study’s authors that even

speech is likely to come absent governmental intervention. Because of the single-mindedness of corporate purpose—profit-making—corporations' management is most interested in freedom of expression (particularly freedom from liability) for the corporations' speech. Its members are less keen to extend the freedom of expression to others, even when those others offer very little commercial threat and appear to be engaged in quintessential political speech activities.¹⁶⁷

Still, perhaps it might be said that McDonald's was acting in this case no differently than a natural person might. As noted First Amendment scholar Thomas Emerson observed, "[i]t has been common for individuals and groups who demanded freedom of expression for themselves to insist that it be denied to others."¹⁶⁸ But large for-profit corporations are not just like any other speaker. They, more than almost any other institution in modern, advanced economies, have massive resources with which to speak and to defend their views. They can do so in court, a venue often unavailable to ordinary people because of the high costs of litigation. They can influence legislation through lobbying, drafting proposed legislation, funding not-for-profit think tanks dedicated to their issues, campaign contributions, and political advertising. And they have a larger role in creating the conditions for *all* communication and mediating the way people relate to other aspects of their lives.¹⁶⁹ But their boards of directors are not elected by the

more "comprehensive controls" on such marketing efforts were called for. Marc T. Braverman & Leif Edvard Aaro, *Adolescent Smoking and Exposure to Tobacco Marketing Under a Tobacco Advertising Ban: Findings From Norwegian National Samples*, 94 AM. J. PUB. HEALTH 7 (2004) (analyzing two sets of over 4,000 respondents), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1448426> (last visited June 15, 2007).

¹⁶⁷ The "McLibel" case is not solely attributable to the relative strictness of English libel law. Corporate interests have launched similar efforts in the United States. One example is the case brought against comedian Al Franken by the Fox News Network. See *Fox News Network, LLC v. Penguin Group (USA), Inc.*, 2003 WL 23281520 (S.D.N.Y. 2003). The case was quickly dismissed. *Id.* Nevertheless, it is indicative of the trend for more protection for commercial speech, given that Fox's lawyers did not dismiss this lawsuit out of hand as unwarranted by existing law, see FED. R. CIV. P. 11(b)(2), and that it was brought at all. Indeed, part of what makes the case such a good example of the trend is that so many people, including the court and many observers, seemed to think the claim was facially ridiculous. Apparently it was not ridiculous enough to deter Fox's lawyers. For a survey of much more troubling cases where corporations have been more successful in suppressing expression, see Vladeck, *supra* note 144, at 1077-78 and accompanying text. For a book length treatment of the subject, see KEMBREW MCLEOD, *FREEDOM OF EXPRESSION: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY* (2005).

¹⁶⁸ Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 888 (1963).

¹⁶⁹ Indeed, some churches have begun to adopt the language of marketing to promote themselves. See Bill Sherman, *Confronting the Great Disconnect*, TULSA WORLD, Nov. 4, 2006, at A6 (describing Baptist church organization's use of census data and marketing concepts to "develop strategies to develop relationships" with people in the community as a means of enlarging congregations). See also VINCENT J. MILLER, *CONSUMING RELIGION: CHRISTIAN FAITH AND PRACTICE IN A CONSUMER CULTURE* (2005).

public at large.

Although it could be argued that disparity in resources and abilities to project one's message are just a necessary corollary of freedom, this argument focuses too much on the way corporate persons might be said to resemble natural persons and glosses over their very significant structural and moral differences from natural persons, differences that suggest that corporate entities neither need, nor should be granted, the sorts of liberal speech rights that are (at least in theory) the birthright of natural persons.¹⁷⁰ In this essay I review some of those differences and argue that both in theory and in practice it is not only permissible to differentiate between natural and legal persons but necessary to do so in order to retain even a modicum of governmental impact on important social goals. I do not suppose that declining to extend full speech rights to commercial interests will be the panacea to address all the social ills raised here. Far from it. Agency capture, lack of political will to fund and/or enforce regulations, and many other factors presumably play a role in our current situation. I do suggest that meaningful progress on goals such as slowing or reversing trends with respect to environmental degradation and the protection of public health will be difficult to accomplish without some governmental controls on commercial speech.

A. *The Structure of a Corporation*

It appears to have always been a matter of some conceptual difficulty how the law ought to deal with corporations. The idea that corporations are "persons" for some purposes under the law is one of long standing.¹⁷¹ Initially, corporations were authorized solely by the grant of a charter from the government.¹⁷² The understanding was that such charters were to be sparingly granted and only where the proposed corporate enterprise served some greater purpose for the common good rather than merely the enhancement of wealth for investors.¹⁷³ As a creature of the state's creation, the corporation was subject to the state (or the Crown), which often detailed how the corporation was to be internally governed, and prescribed limitations on its term of life, the number of shareholders, and so forth.¹⁷⁴ Typically the grant was

¹⁷⁰ It seems worthwhile to observe that if corporations, unlike persons, should not have social responsibilities because they are not people, this should be a valid basis for refusing to extend corresponding rights. For an argument that distinctions between legal persons should be centered in the corporeal, see David Graver, *Personal Bodies: A Corporeal Theory of Corporate Personhood*, 6 U. CHI. L. SCH. ROUNDTABLE 235 (1999).

¹⁷¹ See *supra* note 132.

¹⁷² See HORWITZ, *supra* note 133, at 72-73.

¹⁷³ See, e.g., HURST, *supra* note 155, at 13-57.

¹⁷⁴ *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

extended in order to perform some public service. This concept of the business corporation—as an organization with a quasi-public function and strict regulation by government—situated the corporation in its early days, particularly with respect to public works like bridges and canals, as a sort of extension of the governmental function—an early example of privatization.¹⁷⁵

As technology created opportunities for economic expansion, the charter, or grant theory of the corporate form seemed less suitable, or even practicable, for the growing economy. Some saw the charter system as vulnerable to abuse and leading to undesirable concentrations of economic power through patronage.

“Free incorporation,” that is, the move to make incorporation more generally available and less subject to the whims of the legislature or the favor of particular lawmakers, was seen as a way to both stimulate economic growth and ensure greater democratization of that growth. States began to compete to offer incorporation statutes which promised the most attractive legal environment for incorporation by relaxing or dispensing with much of the prior regulatory supervision.¹⁷⁶ “Gradually, by making the corporate form universally available, free

¹⁷⁵ “From the 1780’s well into the mid-nineteenth century the most frequent and conspicuous use of the business corporation—especially under special charters—was for one particular type of enterprise, that which we later call the public utility and put under particular regulation because of its special impact in the community.” HURST, *supra* note 155, at 17. See also Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105, 110 (1888) (“But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency . . .”). The corporate form was also initiated as a way for religious and charitable institutions to hold property, and such organizations were rather liberally granted charters. See HURST, *supra* note 155, at 16. The incorporation of churches and charitable groups, and the inclusion of other political not-for-profits do not mean that there were and are no distinctions in their organization from that of the for-profit organization. “[T]he law regulating the relations of the members to each other and to the united body must differ according to the nature and objects of the corporation.” Williston, *supra*, at 123. On the other hand, the law applied to one was often applied to the other as in the *Dartmouth College* case itself which involved a charitable institution. Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1605 (1988). But in many respects the law treats for-profit and not-for-profit corporations differently. See, e.g., 26 U.S.C. § 501 (describing an extensive list of, among other things, corporations and organizations which shall be tax exempt). Although the early notion of limited charters has been superseded, general corporations are still formed to perform explicit governmental purposes. See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (“[W]here, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”). Of course there was also the municipal charter incorporating towns and townships. Meanwhile, some business corporations went the other direction: they were businesses first and then built housing for workers and established some of the infrastructure of towns in order to retain workers. For a discussion of company towns, see LINDA CARLSON, *COMPANY TOWNS OF THE PACIFIC NORTHWEST* (2003); CRANDALL A. SHIFFLETT, *COAL TOWNS: LIFE, WORK, AND CULTURE IN COMPANY TOWNS OF SOUTHERN APPALACHIA, 1880-1960* (1991).

¹⁷⁶ See, e.g., HORWITZ, *supra* note 133, at 73.

incorporation undermined the grant theory. Incorporation eventually came to be regarded not as a special state-conferred privilege but as a normal and regular mode of doing business.”¹⁷⁷ Instead of being a creature of the law, the corporate form seemed a natural and reasonable form of organization for the conduct of business, a form for which there was no felt necessity for government to micro-manage business enterprises outside of those industries that might be deemed “natural monopolies.” And natural monopolies fit somewhat comfortably into the old public function notion of a corporation. But by the late 19th century the public apparently felt that the government had little role to play in general commerce.

As the free incorporation model came to predominate, the entity theory and notions of corporate personhood continued to gain ground. “By rendering the corporate form normal and regular, late-nineteenth-century corporate theory shifted the presumption of corporate regulation against the state. Since corporations could no longer be treated as special creatures of the state, they were entitled to the same privileges as all other individuals and groups.”¹⁷⁸ If they were persons under the law they could be persons with whom contracts could be entered into and who had rights under those contracts.¹⁷⁹

Consistent with these new legal theories, the largest corporations had to deal with the public opposition to their enormous power.

The pure size of many corporations—their number of employees, the magnitude of their production, their capital resources, their national scope in distribution, and their capacity for political influence—persuaded many Americans, classic economic theory notwithstanding, that the nexus of social institutions within which they lived had been radically transformed. . . . This momentous shift in the balance of social forces created a crisis of legitimacy for the large corporations.¹⁸⁰

The large national (and later multinational) corporation addressed that crisis by efforts on many fronts, and communication was one of the most significant fronts. Through advertising and public relations

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 74.

¹⁷⁹ See *Dartmouth*, 17 U.S. (4 Wheat.) at 636-37 (holding that a corporation only possesses the attributes that its charter bestows upon it and it does so to the same degree a natural person would have such rights via contract, and thus the state could not unilaterally amend that contract). See generally Hovenkamp, *supra* note 175. For more on the personification theory, see Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).

¹⁸⁰ ROLAND MARCHAND, *CREATING THE CORPORATE SOUL: THE RISE OF PUBLIC RELATIONS AND CORPORATE IMAGERY IN AMERICAN BIG BUSINESS* 2 (1998). The injunction to develop a soul continues. “[Companies] need to demonstrate *that they have heart and soul*, especially at a time when the public is so distrustful of corporate America.” RONALD J. ALSOP, *THE 18 IMMUTABLE LAWS OF CORPORATE REPUTATION* 70 (2004) (emphasis added).

campaigns, corporations attempted to give themselves a human face, to create for the corporation a personality.¹⁸¹

Today it is fair to say that viewing the corporation as person with a personality has come to be seen as completely natural and that it is thus reasonable for corporations' representatives to claim that the corporation has expressive rights as an aspect of that personhood.¹⁸² However, it is important to remember that the metaphor of corporate personhood is just that, a metaphor. And this metaphor elides several realities of the operation of large scale corporate entities in society¹⁸³ as well as structural aspects of the corporate form that make corporate expression relentlessly one-sided and, ultimately, problematic.

B. *The Primacy of the Profit Motive*

Pursuant to conventional interpretations of black letter corporate law, the corporation's officers and directors have primarily one duty—to enhance shareholder value.¹⁸⁴ Furthermore, this duty accrues not to

¹⁸¹ *Id.* The creation of a corporate "personality" actually developed into an advertising subcategory: corporate image advertising. TERENCE A. SHIMP, *ADVERTISING, PROMOTION AND SUPPLEMENTAL ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS* 285-86 (6th ed. 2003) (1986). "Corporate image advertising is aimed at creating an image of a *specific corporate personality* in the minds of the general public and seeking maximum favorable images amongst selected audiences, e.g., stockholders, employees, consumers, suppliers, and potential investors." S. Prakash Sethi, *Institutional/Image Advertising and Idea/Issue Advertising as Marketing Tools: Some Public Policy Issues*, 43 J. MARKETING 68, 70 (1979) (emphasis added). The Sethi article contains a number of examples of the array of the types of advertisements falling into these two categories. At present it is wholly unremarkable to talk about a corporation as if it had a personality. Sethi distinguishes between image advertising and issue advertising because the tax implications differ. For a discussion of the difficulty the courts have had in dealing with corporate image advertising under the First Amendment and the commercial speech doctrine, see C. C. Laura Lin, *Corporate Image Advertising and the First Amendment*, 61 S. CA. L. REV. 459 (1988).

¹⁸² There are actually several theories operating simultaneously with respect to what sort of entity a corporation is. Different theories have gained favor at different times, from the charter theory to the natural entity to legal entity to nexus of contracts. For a discussion of the historical development of the various theories, see David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 (1990).

¹⁸³ The power of the metaphor is truly astonishing. It is very difficult to write about the corporation without anthropomorphizing it and talking about what it "wants," "feels," and "needs," as if there was even an "it" in the same way as a person or a thing. Enormous holding companies like Time-Warner are made up of numerous other corporations, many of which have distinct corporate identities. Often it is the subsidiaries that are the public face of the parent and the parent companies barely register on the public consciousness at all, despite their enormous influence in the culture. For a discussion of the power of this metaphor in the *Nike* case, see Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEGAL WRITING DIRECTORS 169 (2004) [hereinafter Berger, *What is the Sound of a Corporation Speaking?*].

¹⁸⁴ As Professor Elhauge has pointed out, this "black letter" law has always been significantly modified by the business judgment rule in a fashion that not only permits some profit-sacrificing

the *real* shareholder, a shareholder who can be expected to have a multiplicity of concerns, but to the *idea* of an average shareholder—what Daniel Greenwood calls “the fictional shareholder.”¹⁸⁵ The fictional shareholder cares for nothing but short-term financial gain.¹⁸⁶

[H]uman shareholders who are also neighbors or employees or customers or friends may have other commitments beyond an extra nickel in the quarterly dividend. Even on purely economic issues, since shareholdings in this country are not only wide but shallow, many shareholders will find that their basic interests are aligned more with employees, stability or customers than with the highest

behavior but virtually guarantees it because of the moral and social pressures on managers. See Elhauge, *supra* note 115, at 740-44. However, even Professor Elhauge agrees that profit maximization is the management’s “primary obligation” to shareholders. *Id.* at 745. The rule is often stated as “maximize” shareholder value which has been justly criticized as an exaggeration. See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, in *THE ICONIC CASES IN CORPORATE LAW 1* (Jonathan R. Macey ed., 2008). Certainly the business judgment rule ensures that there is no duty to “maximize” that economic welfare. As Professor Elhauge has observed, the business judgment rule not only permits some profit-sacrificing behavior but virtually guarantees it because of the moral and social pressures on managers. Nevertheless, the Model Business Corporations Act defines “corporation” as “a corporation for profit . . .” MODEL BUS. CORP. ACT § 1.40(4). And even Professor Elhauge agrees that profit maximization is the management’s “primary obligation” to shareholders. The existence of so-called corporate constituency statutes that provide that the members of boards of directors may consider the needs of constituencies other than shareholder, Stout, *supra* at 5, only serves to underscore the primacy of the obligation to direct efforts at enhancing economic value of firm because they would be superfluous if it was already well-understood that directors did not violate their responsibilities to shareholders when considering the needs of other constituencies. Moreover, such constituency statutes are permissive as opposed to the mandatory fiduciary duties owed to shareholders. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 579 (1992). The business judgment rule represents an implicit understanding that transferring the decision to the courts of what specific action would be “profit maximizing” in any particular situation would result in significant increases in transaction costs and that the resultant inefficiency would virtually guarantee further reductions in profits. Nevertheless, the existence of such discretion represents no assurance it will be exercised in a manner consistent with the public interest. See *The Good Company*, ECONOMIST, Jan. 22-28, 2005, at 3. It is not clear that even if one adopts a nexus of contracts theory of the corporation this makes a meaningful difference in the goal setting with respect to public welfare issues. See Stephen Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1427 & 1446-47 (1993) (arguing that despite the replacement of the “outdated [shareholders as owners] model of the firm” with a nexus of contract model, shareholder wealth maximization norm is nevertheless still dominant and appropriately so). Moreover, this conventional understanding has been trenchantly criticized by Professor Daniel Greenwood. See Daniel J. H. Greenwood, *The Dividend Problem* (Utah Legal Studies, Paper No. 05-10, 2005), available at <http://ssrn.com/abstract=799144>.

¹⁸⁵ I am indebted to Professor Daniel Greenwood for this insight. See Daniel J. H. Greenwood, *Fictional Shareholders: For Whom the Corporation Is Managed Revisited*, 69 S. CAL. L. REV. 1021 (1996).

¹⁸⁶ The focus on the short term may be partly due to the rise of the importance of the institutional investor. See Leo A. Strine, Jr., *Human Freedom and Two Friedman: Musings on the Implications of Globalization For the Effective Regulation of Corporate Behavior* 30-37 (Univ. of Pa., Paper No. 187 2007), available at <http://lsr.nellco.org/upenn/wps/papers/187> (attributing some of the recent scandals such as Enron as arising from the focus on short-term gains).

possible value for their shareholdings: A decrease in your phone bill is likely to be worth more to you than the commensurate drop in the price of the telephone company shares held by your pension fund. Only foreign shareholders with little connection to the American economy or politics beyond their shareholdings approximate this conventional image of a shareholder always interested in higher stock returns.¹⁸⁷

Officers and directors of corporations owe fiduciary duties to these shareholders.¹⁸⁸ And perhaps because the interests of real human shareholders may be varied, complex, and would be impossible to serve in reality, administration of a large group of shareholders is thought to demand the conceptual simplicity of the profit motive in order to define just what interests these fiduciaries should assume they must be serving.¹⁸⁹

Since the fictional shareholder is just an investor, it is immortal and time indifferent—the market allows any investor to transform future income into present income, short term gains into long term ones, and so on, simply by applying the correct discount rate. It is context

¹⁸⁷ Greenwood, *supra* note 109, at 1036. It may be that Greenwood underestimates the degree to which institutional investors, primarily the managers of pension funds, *do* behave this way because the aggregation of many shareholders into a fund has the same effect: of reducing the variety of shareholder interests to a single value, profit. The growth of institutional funds that are formed with the objective of investing only in certain types of companies may have made the fictional shareholder model less relevant as an empirical matter than in times past. However, my sense is that such investment funds still represent the minority of investors. Moreover, they are also not indifferent to profit.

¹⁸⁸ See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 648 (Mich. 1919). In deference to Professor Stout, see *supra* note 184, I would note additional support for this proposition is found in *Bayer v. Beran*, 49 N.Y.S.2d 2 (Sup. Ct. 1944) (directors of a corporation are fiduciaries for shareholder interests); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (duty to maximize stockholder value in takeover); *Blasius Indus. v. Atlas Corp.*, 564 A.2d 651, 663 (Del. Ch. 1988) (directors as agents for stockholders); *Stahl v. Apple Bancorp.*, 579 A.2d 1115, 1121 (Del. Ch. 1990), as well as Chancellor Strine's article, *supra* note 186. Note that for my purposes here it may not make much difference whether there is a duty to maximize value for stockholders or a duty to maximize firm value since either interpretation creates the same pressure to direct firm activities toward the most profitable (whether long or short term) action rather than one which is ethically desirable (understanding that what is ethically desirable is a goal even more elusive of adequate definition than profit maximization).

¹⁸⁹ Within this economic interest is of course an enormous range of movement. Saying that the fiduciary is to take into account the shareholders' economic interests does not self-evidently further dictate whether those interests are long or short term, must take the form of dividends paid out or value of the stock or many other permutations of how the fiduciaries may act out on their responsibilities. For a report on some of the current debate about short-term versus long-term business planning, see *Jam Today: Worries About Short-Termism Grip America's Business-Elite—Wrongly, Perhaps*, *ECONOMIST*, July 14, 2007, at 67. Moreover, with the advent of socially responsible investing (SRI) some investors are attempting to bring their investments in line with their overall moral convictions through shareholder resolutions, divestures of stocks of companies which do not fit investors' agenda and similar actions. See, e.g., Daska Slater, *Public Corporations Shall Take Us Seriously*, *N.Y. TIMES MAG.*, Aug. 12, 2007, at 22. For a general summary of why such initiatives are bad for business, see CSR/SRIWatch, <http://www.csrwatch.com/Sub/Resources/about.htm> (last visited Aug. 12, 2007).

indifferent—since money is perfectly fungible, a pure shareholder is indifferent between money earned in Salt Lake City or Cambridge, Flint or Manila. It has no commitment to particular enterprises: so long as the investment is on the capital frontier, offering the appropriate risk adjusted rate of return, one project is as good as any other. Tin cans and insurance, news magazines and amusement parks—what the company does is a matter of entire indifference. It is universalist in the modernist, not the post-identity, sense: the fictional shareholder recognizes no boundaries, professes no nationality (or, more precisely, will change nationalities at the current or future monetary exchange rate), has no religion, no community, no union, no gender and, oddly enough, no class: the invested funds of the unions are no different from the invested funds of the capitalists against which they struggle. It is, in short, radically uncommitted, cosmopolitan, deracinated, tied to no religion, language, nation or community. Perhaps most important for bargaining purposes, the shareholder is fully mobile—able to leap borders (and professions, commitments and projects) at a single bound.¹⁹⁰

This construction of the shareholder has a lot in common with the economists' workhorse, *homo economus*. Like the economists' fictional rational person, the fictional shareholder bears little resemblance to a real person. Real human beings value many things in addition to their economic interests. Yet, like the fictional rational person, the fictional rational shareholder offers analysts and managers an attractively simple and comparatively straightforward way to analyze performance. So the fictional shareholder continues to be the yardstick against which management and analysts measure the performance of a company.

That makes corporate "behavior" and "speech" very one-dimensional. All roads, all expression, all actions lead back to the (hoped for, if often unrealized) enhancement of shareholder value. In this respect the corporation is a very unusual person since few people can be said to hold one, and only one, value. It might be said in protest that it is an inaccurate picture since, because corporations are run by persons, and persons do have other interests, that those interests and personalities are inevitably reflected in the corporation. And to a limited extent this is true.

Ambiguity about what exactly is best for shareholders—long run stability, short term gain, corporate image, etc., and the personalities of and choices made by a corporation's executive officers can and do make a difference to the corporation's conduct of its affairs and the speech it issues—and not solely in the negative ways of a Dennis Kozlowski or a Jeffrey Skilling, but also in positive ways through the expression of the

¹⁹⁰ Greenwood, *supra* note 185, at 1043 (internal footnotes omitted).

values of a Warren Buffett or a Ray Anderson.¹⁹¹ In addition, the business judgment rule and management perceptions as to what sorts of profit-sacrificing behavior are appropriate and necessary to conform to social norms, allow for some behavior that is not straightforwardly profit-seeking to occur.¹⁹² Nevertheless, the relentless forces of the market and the primacy of economic welfare, as the legal duty and imperative, systematically channel even the most vociferous advocates of a “different” kind of corporate model into the same old mold.¹⁹³

One of the most comical examples of this phenomenon occurred when Johnson & Johnson sued the American Red Cross for trademark infringement. Johnson & Johnson did use the mark first, and Clara Barton, in establishing the Red Cross as a humanitarian organization, did seek Johnson & Johnson’s license and acknowledged its priority. But apparently the American Red Cross had been licensing the use of the mark to manufacturers other than Johnson & Johnson of emergency first aid kits and other medical and surgical goods typically purchased in drug stores. Thus, Johnson & Johnson had something of a dilemma because, pursuant to trademark law, if it did *not* sue to enforce it might be deemed to have surrendered its rights to the logo. On the other hand, as Advertising Age reported, Johnson & Johnson probably knew that “suing the American Red Cross for using—of all things, the red cross logo—wasn’t a slick public-relations move.”¹⁹⁴ That might be something of an understatement. So why did Johnson & Johnson do it? Its executives are not saying, but one manager of a consulting firm was quoted as saying “J & J did the right thing for both its reputation and its financial position, ‘They absolutely had to [sue],’ he said, regardless of the relatively small revenue impact and the reputation risk in taking on the Red Cross because ‘*estimates now are that 65%-70% of the total value of Fortune 500 companies are in their intangible assets.*’”¹⁹⁵ It was a matter of protecting its assets.

Presumably he meant that even though the revenue risk today was small, the loss of a valuable intangible asset such as a logo through acquiescence to infringing uses would represent a greater financial loss in the long term than any harm to its reputation from suing a humanitarian organization. Perhaps so. But the CEO of the American Red Cross did not see it that way. When the suit was filed he issued a

¹⁹¹ Ray Anderson is the “founder and chairman of Interface, Inc., the world’s largest commercial carpet manufacturer,” and an outspoken proponent of a switch to manufacturing processes that contribute to sustainability. BAKAN, *supra* note 112, at 71.

¹⁹² See Elhauge, *supra* note 115.

¹⁹³ See, e.g., Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477 (1995).

¹⁹⁴ Jack Neff, *J & J Targets Red Cross, Blunders Into PR Firestorm*, ADVERTISING AGE, Aug. 13, 2007, available at http://adage.com/article?article_id=119837 (last visited Aug. 13, 2007).

¹⁹⁵ *Id.* (emphasis added).

press release with the following, "For a multibillion-dollar drug company to claim that the Red Cross violated a criminal statute that was created to protect the humanitarian mission of the Red Cross—simply so that J & J can make more money—is obscene."¹⁹⁶ Maybe so. And maybe since the American Red Cross was claiming to be engaging in this licensing to support hurricane awareness but was licensing products like humidifiers that do not obviously fit into the category of hurricane relief supplies we should not take this burst of outrage too seriously. Still, obscene or not, according to some observers, Johnson & Johnson's action was dictated by its duties to the shareholders.

This tendency of the profit imperative (however conceived) to generate antisocial, undesirable, or just downright unpopular activities is perhaps partly attributable to the laws governing for-profit corporations, partly a function of the difficulties in running large organizations, a difficulty which makes profit a seemingly straight forward and quantifiable goal in a morass of less definable goals, and perhaps partly attributable to social attitudes as to what constitute legitimate goals. But that its imperatives seem to eventually overwhelm alternative business models seems undeniable.

Take for example The Body Shop. Anita Roddick founded The Body Shop, a cosmetics company, with the avowed goal of running a different sort of company, one that would be environmentally responsible and which would eschew ethically troubling animal testing. She was an outspoken advocate of corporate social responsibility. Nevertheless, Roddick eventually had to step down from her position as chair and relinquish control, including control of its much vaunted social responsibility programs, because her leadership was seen as not profitable.¹⁹⁷ Roddick's successor at The Body Shop asserted, "We believe in social responsibility *but we are very hard-nosed about profit. We know that success is measured by the bottom line.*"¹⁹⁸ "Roddick's story illustrates how an executive's moral concerns and altruistic desires often must ultimately succumb to her corporation's overriding goals."¹⁹⁹ Similarly, Ben and Jerry's ice cream, for all of its founders' commitment to social responsibility, was sold by its founders to Unilever, a large multinational which did not have an image as a "different" sort of company, but rather one that seemed paradigmatically "old school." To some observers this sale undermined

¹⁹⁶ *Id.*

¹⁹⁷ BAKAN, *supra* note 112, at 51-53.

¹⁹⁸ *Id.*; BAKAN, *supra* note 112, at 53 (emphasis added).

¹⁹⁹ *Id.* It is worth noting that Roddick has been questioned about her consistency with respect to these goals in a number of quarters, with many claiming that her much vaunted values had been (how ironic) more cosmetic than substantive. See, e.g., STAUBER & RAMPTON, *supra* note 131, at 73-76 (exploring conflicts between The Body Shop founder's stated business objectives and principles and the actual conduct of the company).

Ben and Jerry's credibility as a company committed to social justice.²⁰⁰

These sorts of cases suggest that it is difficult to run a business in a way that is not business as usual—economic gain. And perhaps this is because, as Milton Friedman and so many others have argued, management, at the end of the day, has a duty to shareholders, not to the whole world. The only limitations on how corporations carry out that duty to shareholders are those imposed by law. And, as explored above, even law may represent a weak deterrent to the extent that managers may rationally (if not legally) decide to breach and pay rather than comply with the law. Worse, the legal interpretation of managers and directors' duties to shareholders as duties to a fictional shareholder who cares for nothing but economic return, actually creates structural incentives for these managers and directors to make trade-offs that would presumably be morally repugnant in other circumstances (for example choosing to market a drug that may carry with it an unacceptably high risk of injury without disclosing that risk for fear of losing sales) on the grounds that *business* ethics require it.

As Greenwood puts it, "This . . . is the scandal of the fictional shareholder writ in black letter—the fictional shareholder allows people to take actions they know are wrong while believing they are doing the right thing."²⁰¹ Putting aside the difficulty in some contexts with knowing something is wrong before the law has declared it wrong (a concern that presumably does not apply to exposing others to risk of death or serious injury), the problem is this legal construction of the managers' duties does not just allow people to take actions that are wrong. It actually *encourages* them to do so wherever it would appear to enhance shareholder value.

Professor Daniel Greenwood offers a vivid example of this

200 Janger, *supra* note 27, at 74, available at http://www.benjerry.com/our_company/research_library/fin/ (citing Ben and Jerry's Financial History). It is difficult to know whether this loss of credibility is more apparent than real. But at least some commentators have attributed the founders' willingness to sell to Unilever after being told of Unilever's "funding programs for hospitals in Vietnam and schools in Ghana." Laura P. Hartman, Robert S. Rubin & K. Kathy Dhanda, *The Communication of Corporate Social Responsibility: United States and European Union Multinational Corporations*, 74 J. BUS. ETHICS 373, 379 (2007). Of course, as was remarked by one marketing executive on the acquisition of Burt's Bees, another company oriented to consumers interested in environmentally sound products, by Clorox, a company that makes bleach, an environmental pollutant, "it's likely not many of the consumers or category targets for Burt's Bees products are even going to know that Clorox has acquired the company." Jack Neff, *Clorox: Bleach, Charcoal and . . . Burt's Bees*, ADVERTISING AGE, Oct. 31, 2007, http://adage.com/article?article_id=121673&search_phrase=Clorox%3A+Bleach%2C+Charcoal+and. The company probably is not going to make a big effort to educate consumers about this point. But to the extent that they do, all efforts will undoubtedly be to give Clorox the benefit of Burt's Bees "green" image rather than the reverse since sustainability is identified as a "megatrend" in marketing. *Id.* Whether it is a megatrend in *manufacturing* is a different question.

²⁰¹ Greenwood, *supra* note 185, at 1092.

tendency. Greenwood asks his corporations students to imagine themselves the manager of a business organized as a corporation that runs a segregated lunch counter in the South in 1963. The manager believes segregation is wrong. He would like to desegregate the lunch counter. But he has concrete evidence that the corporation would go out of business if he does so. Greenwood reports that year after year, every class concludes that the manager's only options, pursuant to his duties to the shareholders, are to resign his position or to continue to engage in behavior he believes is morally wrong, i.e., segregation as a function of his duty to the shareholders. In this way the law

strongly hinders attempts to take actions that may not only be right, but in the best interest of all the real people concerned: Even most of the students who do not take refuge in the role morality of serving the fictional shareholder are unable to articulate a principled basis for ignoring it. . . . [T]he most they can do in good conscience is resign, leaving the administration of the firm to those who have less problem following institutional norms.²⁰²

The primacy of the profit motive is not however by any means always a morally pernicious influence on corporate decision making and therefore to society at large. Apart from the social benefits of the generation of wealth and prosperity which some might attribute to the increased flexibility of the corporate form and the singularity of its organizational imperative, this imperative might be beneficial (or the least bad alternative) to a more complicated set of imperatives.

The singularity of purpose offers some analytical clarity and simplicity as guides to decision making, at least when compared to more nebulous social goals like "the general welfare" or "happiness." And despite multiple ways of calculating what constitutes the bottom line,²⁰³ such options are manageable models of clarity compared to attempts to assess non-monetary contributions or impacts on social welfare. Thus, although the idea of Corporate Social Responsibility [CSR], the practice of a corporation taking account of the interests of constituencies beyond shareholders,²⁰⁴ has gained popularity,²⁰⁵ that

²⁰² *Id.*

²⁰³ Many criticisms about the orientation to the bottom line overestimate the degree of consensus on what constitutes the bottom line and whether such orientation need invariably be pernicious. On the other hand, even if there is room within the business judgment rule for decision-making that is also consistent with moral judgments in other realms, the evidence suggests, as discussed in this Article, that it may nevertheless offer too much affirmative support for decision-making that will predictably run counter to those other moral belief systems. See, e.g., RALPH ESTES, *THE TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS* (1996).

²⁰⁴ See, e.g., BAUMAN ET AL., *supra* note 108, at 116-17 (discussing state statutes providing shelter within the business judgment rule for constituencies such as employees, suppliers, creditors, etc.); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002); Paul N. Cox, *The Public the Private and the*

movement suffers from the absence of a legal structure (or indeed even a definition) that offers officers and directors clear guidance on what is a permissible versus an impermissible departure from the profit model.. On the one hand, the business judgment rule and existing structures have generally proven capacious enough to protect judgments that trade short term profits for long term benefits.²⁰⁶ So shifting between long and short term payoffs could (theoretically) offer no obstacle to the implementation of CSR.²⁰⁷ On the other hand, when the magnitude of long term gains are difficult to predict with any certainty, or are intangible, managers could still expose themselves to shareholder liability if the alleged long term benefits are intangible enough and the sacrificed short term profits are very large.²⁰⁸

In addition, there is no clear definition of what "corporate social responsibility means."²⁰⁹ "[C]ompanies fasten the label to a quite bewildering variety of supposedly enlightened, progressive or charitable corporate actions."²¹⁰ Not only is the definition wildly imprecise, it is often unclear whether actions undertaken in its name actually produce the aimed for results. So the emerging call for a return to the corporation as a quasi-public institution, with goals beyond profit-making, would seem to be difficult to realize in practice. Moreover, since the corporation is neither a democratic institution, nor one with a publicly elected management, it is reasonable to ask whether the acquisition of such public welfare responsibilities and goal setting is appropriate.

Perhaps this is why *The Economist* suggested in an editorial that CSR as a theory was unnecessary.

The goal of a well-run company may be to make profits for its

Corporation, 80 MARQ. L. REV. 391 (1997).

²⁰⁵ It might be more accurate to say that the notion is enjoying a resurgence of interest. See C. A. Harwell Wells, *The Cycles of Corporate Social Responsibility*, 51 U. KAN. L. REV. 77 (2002).

²⁰⁶ See Elhauge, *supra* note 115.

²⁰⁷ For a discussion of this position as well as some criticisms of CSR see *Corporate Social Concerns: Are They Good Citizenship, or a Rip-off for Investors?*, WALL ST. J., Dec. 6, 2005, at R6, available at http://online.wsj.com/public/article/SB113355105439712626.html?mod=todays_free_feature (last visited Aug. 12, 2007).

²⁰⁸ Economist Milton Friedman suggests there is only "one instance when corporate social responsibility can be tolerated . . . when it is *insincere*." BAKAN, *supra* note 112, at 34 (emphasis added).

²⁰⁹ *The Union of Concerned Executives: CSR As Practised Means Many Different Things*, ECONOMIST, Jan. 22, 2005, at 6 [hereinafter *The Union of Concerned Executives*]. This article forms part of a special report, *A Survey of Corporate Social Responsibility*. *PRWeek* reports that the editorial staff of *The Economist* remains skeptical about the value to shareholders of CSR. See Steve Hemsley, *Who's Responsible?*, PRWEEK, Aug. 12, 2005, at 22 ("At *The Economist* we need hard evidence that CSR is more than just a fig leaf and that actions are being chosen because they are a good use of shareholder's money rather than merely being of personal interest to the CEO.").

²¹⁰ *The Union of Concerned Executives*, *supra* note 209, at 6.

shareholders, but merely in doing that—provided it faces competition in its markets, behaves honestly and *obeys the law*²¹¹—the company, without even trying, is doing good works. Its employees willingly work for the company in exchange for wages; the transaction makes them better off. Its customers willingly pay for the company's products; the transaction makes them better off also. All the while, for strictly selfish reasons, well-run companies will strive for friendly long-term relations with employees, suppliers and customers. There is no need for selfless sacrifice when it comes to stakeholders. It goes with the territory.

....

All things considered, there is much to be said for leaving social and economic policy to governments. *They at least are accountable to voters.*²¹²

While there is some evidence to suggest that the rosy picture of an identity between the corporation's pursuit of its profits and the general welfare is overstated,²¹³ it is beyond dispute that private corporations are not accountable to voters except through the mechanism of governmental control.²¹⁴ Whether it can always be said that what is in the best interest of business is necessarily in the best interest of society as a whole has been an issue of fierce debate and fluctuating legislative trends from the inception of the Republic. The argument that these interests converge has enjoyed a resurgence in the later part of the 20th century and into the present time.²¹⁵ So it is worthwhile to reiterate what may seem to be obvious questions.

²¹¹ This is both a very big "provided" and somewhat tautological since the very thing that many CSR proponents are suggesting is that *the law* require some social responsibility from corporations. Thus, the observation that a corporation's duties do not extend beyond "obeying the law" provides no insight into the law's content and expresses no limitation on what its content *should* be.

²¹² *The Good Company: A Skeptical Look at Corporate Social Responsibility*, ECONOMIST, Jan. 22, 2005, at 3 (emphasis added) [hereinafter *The Good Company*]. Of course the government may not be as accountable to the voters in practice as it is in theory, any more than management of a corporation is in any real sense accountable to the shareholders for its actions.

²¹³ Characterizing workers as "willingly" working in exchange for wages when for most people some sort of work is necessary for survival and where the wage for most work is set by the employer, not negotiated by the worker, borders on disingenuous. Claiming that consumers are better off for having "willingly" paid for products that were relentlessly promoted to them and which they may not need or which may be affirmatively hazardous to their health (such as cigarettes) borders on the delusional. For more discussion of the tendency of the marginal utility of efficient bargaining to enhance disparities in wealth, see Daniel J. H. Greenwood, *Torts in Corporate Law: Do Corporations Have a Fiduciary Obligation to Commit Torts?* (Utah Legal Studies, Paper No. 05-06, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=776206.

²¹⁴ They could be said to be accountable to consumers. And they will be, to the extent that consumers are aware of any misconduct. Whether or not they become aware of grounds for calling the company to account and what methods are at their disposal to do so are often, but not exclusively, a matter of governmental control through law.

²¹⁵ See, e.g., Hansmann & Kraakman, *supra* note 115.

First is the observation that, as *The Economist* editorial recites (as if brushing aside an obvious and unproblematic constraint) that a company may only increase profits within “the limits of the law.” Milton Friedman made a similar observation. “There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”²¹⁶

But such statements offer no help at all in discerning what the limits of the law or the rules of the game ought to be. Instead they naturalize *existing* limits as if they were a product of some organic process rather than constructions of law subject to change. If the question is what the law regulating corporations *ought* to be, it begs the question to say that law reform should not impose any more duty on the corporation than to pursue profits within “the limits of the law.” When it comes to corporate speech, this is precisely the problem: What *are* the limits of the law? Or, what should they be? It cannot be the case that the current laws represent a fixed state from which no legal reform is legitimate. So, presumably, legal reform of the treatment of corporate and commercial speech and thus what it means to “obey the law,” is possible.²¹⁷

The second question—what should the law be?—goes back to the analysis of incentives in the corporate context. Assuming the law shielded false statements, even those intentionally made, would not a corporation’s management have a *duty* to make false statements whenever truthful statements might negatively affect profits?²¹⁸ Under the current understanding, it seems likely that many officers and directors would interpret their duty in that fashion.

Similarly, while it is true that people might have many motivations to make false statements apart from financial ones, a financial motive is singled out as particularly significant in a number of contexts (in many it may be dispositive) as if, under the law, it were routinely considered a

²¹⁶ Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html> (last visited Aug. 12, 2007).

²¹⁷ In this regard it is interesting that some observers think that CSR should be something *other* than or *more* than the law requires in order to *really* qualify as social responsibility. “Many businesses think that merely complying with environmental regulations is CSR, when they are only doing what they must by law.” Hemsley, *supra* note 209, at 1 (internal quotes omitted). Since corporations are not human it hardly seems reason for criticism that they are merely following the law. But I submit this arises from the anthropomorphism engendered by the use of the metaphor of corporate personhood.

²¹⁸ Greenwood, *supra* note 113, at 5. “The corporate law that corporations have chosen directs corporate decision-makers to cause “accidents” *deliberately* (even if statistically) in the name of profit.” *Id.*

motivation of a different order and magnitude than emotions such as love, jealousy, envy, competitiveness, vindictiveness, officiousness or any number of human emotional responses that while not necessarily always standing apart from monetary motives, may not perfectly correspond to them either. For example:

Personal financial interests in a transaction with a corporation may create conflicts of interest for members of the board of directors who voted on the transaction and support claims of breaches of duty to the corporation.²¹⁹

A judge must automatically recuse herself if she has a financial interest related to one of the parties before her.²²⁰

A financial motive can be an aggravating factor in sentencing for many crimes or even be an element of some crimes.²²¹

Copying copyrighted material in order to use for a commercial purpose may be a consideration in whether or not a particular use is a "fair use."²²²

In short, there are any number of areas where the law singles out financial benefit as a motivation which may present a heightened danger of corruption of truth or of the ability to render detached judgments. For-profit corporations are created by law to make an economic profit and its agents are committed by law to advancing this interest. Consequently, it seems reasonable to view the profit motive with the same cautiousness in this area just as in many others. The question of externalities, in particular, suggests caution is appropriate before extending broad First Amendment protection to speech generated by an institution with such a narrow range of moral influences because the effects of corporate decision making can be enormous.

²¹⁹ See, e.g., MBCA §§ 8.31(a)(2)(iii), (v) (describing circumstances that might constitute a conflict of interest). It must be noted that this does not represent an automatic basis for finding a breach of loyalty. See MBCA §§ 8.31(b)(1)(i)–(ii) (placing burden of showing harm on party challenging conduct).

²²⁰ See, e.g., 28 U.S.C. §§ 455(b)(4), (c) (mandating refusal where judge has financial conflict of interest).

²²¹ See, e.g., FLA. STAT. § 921.141 (providing enhancement for a homicide committed for financial gain); see also *Gore v. Sec. for Dept. of Corr.*, 492 F.3d 1237 (11th Cir. 2007).

²²² See, e.g., *Sun Trust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1267–71 (11th Cir. 2001) (owners of copyright for "Gone With the Wind" sued for alleged infringement by publication of parody "Wind Done Gone"; court held plaintiff unlikely to overcome fair use defense for parody even though parody was produced for a commercial purpose because commercial purpose is only one consideration and not dispositive). For a discussion of how fair use intersects with First Amendment protection, see Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004). See also Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Campaign Finance Reform, Hate Speech and Pornography Regulation and Telecommunications Regulation*, 42 B.C. L. REV. 1 (2001).

C. Corporations as "Externalizing Machines"²²³

Economic activity can generate what economists call externalities, that is, costs to others associated with the production of goods and services.²²⁴ Something is "external" by virtue of its cost being absorbed outside the company.²²⁵ Environmental pollution is a familiar example of an externality. More subtle corporate-created externalities may include the social costs to individuals caused by the requirement that human capital, particularly for top executives, be highly mobile²²⁶ or requiring working hours incompatible with raising a family or caring for an elderly parent or other dependent person.²²⁷ When a company attempts to address issues like this by explicitly making policies intended to absorb some of the costs of accommodating these other interests it could be said to be internalizing what the law had allowed to be externalized. In some cases, corporate managers conclude that a particular practice, characterized as a cost, might actually represent an investment because it will generate (or it is hoped it will generate) benefits in the long run.²²⁸ For example, some companies adopt family

²²³ See BAKAN, *supra* note 112, at 60 (Chapter 3).

²²⁴ An externality could also be a benefit. For example, by locating a store in a particular town Wal-Mart may provide jobs which could mean that other social impacts related to employment, such as mental health, physical well-being, incidence of crime or vandalism will be affected. Indeed, it was on the basis of the perceived existence of just such positive externalities that *The Good Company*, *supra* note 212, suggested that a corporation's attention to the bottom line will result in the optimal boon to society. However, this section deals with the external costs imposed by business because in many areas the law does not recognize these costs as "belonging to" or attributable to the corporation's activities at all but instead as a sort of natural phenomenon, causeless and irremediable by the law.

²²⁵ Identifying what is internal and what is external may be very sensitive to assessments of causal relationships. For example, if rootlessness contributes to reduced social support networks and long hours add to stress and both make workers more vulnerable to depression, alcoholism and drug abuse or other mental disorders or to stress-related physical ailments like heart-attacks, the corporation does not succeed in completely externalizing costs because of lost worker productivity, health care costs and the like. For a discussion of how current economic practices may contribute to social problems, see RICHARD SENNETT, *THE CORROSION OF CHARACTER* (1998).

²²⁶ See Peter T. Kilborn, *The Five Bedroom, Six Figure Rootless Life*, N.Y. TIMES, June 1, 2005, available at <http://www.nytimes.com/2005/06/01/national/class/01ALPHARETTA-FINAL.html>.

²²⁷ See Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1258 (2004).

²²⁸ Because of the magic of double-entry booking in some sense all costs are income generating. However, the managers of a corporation often seem to view a cost like the operation of a daycare center, as simply a cost that reduces the profit margin without any corresponding benefits. But of course if there are cost *savings* in the form of greater efficiency, less absenteeism, great employee loyalty and the ability to attract the best workers, it may well be that a particular cost is more than recovered in savings in other areas. However, to know this one would have to study it and know what to study and be able to quantify factors such as loyalty, that may be difficult to quantify. Unless there is a perceived relationship between such inputs managers may not be able, initially, to see the possibility of savings and see only the costs.

leave policies more generous than those required by law because the management believes that without such programs the best job candidates will not be attracted to the firm. However, in many other instances of companies internalizing externalities (basic family leave policies, minimum wage laws, environmental laws), such internalizing has taken place only because it was required by law. In other words, as long as the law does not *require* a particular practice, the logic of profit-seeking suggests that the company should (if it can) externalize the cost.

"The corporation is an externalizing machine, in the same way that a shark is a killing machine."²²⁹ It "is deliberately programmed, indeed legally compelled, to externalize costs without regard for the harm it may cause to people, communities and the natural environment."²³⁰ This does not make the corporate form, or any specific corporation, evil. Rather, the corporation, as structured, is inherently *amoral*, and so it is dependant for its moral content upon either the positive law or the vagaries of the personalities of the specific persons in charge.²³¹ If slave labor became legal, corporations might have a duty to engage in it under the current legal regime.²³² If it became legal to kill rival

Therefore, typically such programs are only initiated under a government mandate, that is because the law requires it and thus makes it a cost of doing business, or where some entity initiated the practice, the practice gained social acceptance to the extent it becomes industry standard so that all companies in a particular industry must offer particular benefits in order to remain competitive. Again, in this case it is internalized as a cost of doing business, but through the operation of social norms rather than law. Assuming the latter is more acceptable to many than the former, the troubling question becomes what to do where the norms do *not* appear to dictate internalizing a very large cost, say global climate change? In such cases the question is whether government intervention is worse than allowing the harm to continue unabated.

²²⁹ BAKAN, *supra* note 112, at 70 (quoting businessman Robert Monks from an interview with the author).

²³⁰ *Id.* at 72-73.

²³¹ In a recent article Douglas Litowitz asks, "Are Corporations Evil?" and concludes that although there is much to be said for what he calls the criticisms of the structural problems in the organization of corporations, it is actually *size*, not the corporate *form* which is most at fault for generating the problems. Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 814-15 (2004). Litowitz notes that most corporate critics do not extend their criticisms to "mom-and-pop corporations." *Id.* He has a point. Many of the observations here apply only to large corporations. However, given that some observers consider the close corporation virtually obsolete and that the large scale partnerships and limited partnerships that Litowitz identifies as occasionally perpetrators of misconduct that makes the news operate under the same for-profit imperatives as enterprises operating under the corporate form, the differences may not make much difference for these purposes. Focus on the variations of a commercial form may be just an argument about details. The salient point may be that the organization is a commercial one. It is possible that all of the arguments herein can be applied to the partnership or other business organizational forms to the extent that they diffuse responsibility and focus on profits for shareholders, partners or investors. The key may be whether there is any real accountability to anyone but themselves.

²³² Some would say that corporations like Nike (or its subcontractors) already *do* engage in something uncomfortably close to slave labor, distinct only insofar as it does not include legal ownership of the employees' person, but otherwise involving much of its aspects—lack of real freedom, oppressive working conditions, physical punishment, control through sexual battery, etc. See Amended Complaint at 5, *Kasky v. Nike, Inc.*, 539 U.S. 654 (2003) (No. 994446).

executives, steal trade secrets, or to kill people for lucrative body parts, then presumably all corporations would do those things—not just the renegade few.²³³ The law sets the limits. Often, the criminal law sets those limits, but because a corporation has “no body to kick and no soul to damn,”²³⁴ the penalties for transgressing these laws largely consist of monetary penalties.²³⁵ Calibrating the amount of the penalty to represent a real disincentive to future misconduct has always been a difficult undertaking. Profits of many of those multinational corporations which are most likely to have widespread impact on the public welfare are so enormous that the proportional penalties assume a size that, taken in a vacuum, seem self-evidently excessive to some observers.

But taken in the context of the amount at stake, large penalties may

(describing alleged corporal punishment and other oppressive labor practices of Nike subcontractors' factories in Vietnam, Indonesia and China). For a more general discussion of the sweatshop issue, see Donald C. Dowling, Jr., *The Multinational's Manifesto on Sweatshops, Trade/Labor Linkage, and the Codes of Conduct*, 8 TULSA J. INT'L & COMP. L. 27 (2000). But one does not need to travel outside of the U.S. to encounter businesses willing to engage in tactics bordering on the employment of slave labor. The use of illegal immigrants, such as migrant farmer workers who are controlled by the threat of disclosure to the authorities offers one persistent example. In another example, in Tulsa, Oklahoma, a local business was charged with slavery for allegedly importing workers from India and then holding them hostage on the premises, denying them adequate wages, freedom of movement, etc. The employer, John Pickle Co., was found to have violated minimum wage laws by importing workers from India for what it described as a “training program,” even though the workers were actually highly skilled welders and the like, so as to evade the minimum wage law. See Michael Overall, *Verdict Blasts Pickle*, TULSA WORLD, Aug. 27, 2004, at A1. Those workers also alleged that the company held them prisoner in a factory dormitory, confiscated their passports and other documents and would not allow them to leave the factory even when off duty and had lied to them about the status of the immigration visas that would be obtained for them. *Id.*

²³³ In the satirical novel *Jennifer Government*, author Max Barry creates just such a world in which everyone takes on the name of the company they work for as a surname, the government is available for hire on a private contract basis and is relegated to a fairly minor role as referee in the corporate violence that starts with a marketing plan by a fictional Nike company to kill ten customers in order to generate buzz about a new model of sneakers. MAX BARRY, *JENNIFER GOVERNMENT* (2003).

²³⁴ NACE, *supra* note 133, at 5 (“As Baron Thurlow said some three centuries ago, ‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?’”).

²³⁵ Monetary penalties can include both civil and criminal fines as well as laws exposing the company to civil liability. Typically, multiple enforcement mechanism coexist and overlap. In addition, regulatory agencies can have specific enforcement powers to order things like recalls, clean-ups, corrective statements and other affirmative steps. Some feel that the ability to fine is more likely to inspire compliance than the recall power alone. Eric Lipton & Louise Story, *Bid to Root Out Lead Trinkets Falters in U.S.*, N.Y. TIMES, Aug. 6, 2007, available at <http://www.nytimes.com/2007/08/06/business/06toys.html?th&emc=th#> (last visited Aug. 6, 2007) (reporting unacceptably high levels of lead in children's jewelry, 96% originating from China, and quoted federal officials as saying that they need the ability to fine in order to meaningfully deter manufacturers violating the lead standards because “recall after recall” was not enough to make the “the marketplace safe”). See also Env't News Serv., *Oil Companies Settle Fuel Violations for 1.5 Million*, CORPWATCH, Oct. 6, 2006, available at <http://corpwatch.org/article.php?id=14165> (reporting settlement for violations of Clean Air Act).

not seem so excessive. For example, the recent \$253.5 million verdict entered against Merck in one of the Vioxx cases included a figure for punitive damages that was “not picked at random.”²³⁶ Rather, it was a figure pulled from “a 2001 Merck estimate of additional profit the company might make if it could delay an F.D.A. warning on Vioxx’s heart risk.”²³⁷ Note the calculus that Merck engaged in—it estimated what a truthful communication of the risks of Vioxx would cost the company as a component of the decision about whether to disclose this information to the public.²³⁸ Nevertheless, because defendants such as Merck have successfully managed to convince the public and the legislatures to focus on the size of verdicts like this one in isolation, they have succeeded in securing the passage of caps on liability that reduce such awards and thereby diminish their effectiveness as penalties.²³⁹

Even these restraints, such as they are, will be breached if a corporation’s executives conclude that the penalties exacted by law will not diminish profits as much as the failure to engage in the prohibited activity.²⁴⁰ As author Joel Bakan notes, “Corporate illegalities are rife throughout the economy. Many major corporations engage in unlawful behavior, and some are habitual offenders with records that would be the envy of even the most prolific human criminals.”²⁴¹ In support of this assertion he lists the 42 violations or judgments (most relating to environmental issues) issued against General Electric for the period between 1990 and 2001.²⁴²

On the other hand, not all outcomes driven by the profit motive are necessarily bad. There are also what we might call the positive externalities of the profit motive. If images and entertainment about

²³⁶ Alex Berenson, *For Merck, the Vioxx Paper Trail Won’t Go Away*, N.Y. TIMES, Aug. 21, 2005, at 1, 17.

²³⁷ *Id.* at 17 (emphasis added).

²³⁸ Initially Merck announced its determination to litigate all the cases, despite the fact that these ran into the thousands. It won the majority of cases decided after this one. Nevertheless, on November 9, 2007 Merck publicly announced it had reached a settlement with the plaintiffs in some 27,000 cases for \$4.85 billion. Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES, Nov. 9, 2007, at A1. The settlement amount is only “about nine months of profit” for Merck and, according to analysts, represents a victory for Merck and validates its aggressive strategy to initially litigate forcefully, a strategy which resulted in it winning eight out of ten of the cases that went to a jury. See Alex Berenson, *Analysts See Merck Victory in Vioxx Settlement*, N.Y. TIMES, Nov. 10, 2007, available at <http://www.nytimes.com/2007/11/10/business/10merck.html> [hereinafter Berenson, *Analysts See Merck Victory*].

²³⁹ For example, Texas law which puts caps on punitive damages apparently meant that the Vioxx verdict would be automatically reduced to \$26.1 million. Berenson, *Analysts See Merck Victory*, *supra* note 238, at 1.

²⁴⁰ A cap on damages may not completely eliminate the deterrent effect of damage awards where the company faces several thousand lawsuits, as Merck did. *Id.*

²⁴¹ BAKAN, *supra* note 112, at 75.

²⁴² *Id.* at 75-79.

gays and lesbians are more prominent in the culture in 2007 than they were in 1980, it may have a lot to do with manufacturers of products and sellers of services awakening to the possibility of a market that had been neglected.²⁴³ Many of us view this as a morally worthwhile phenomenon, one that contributes to a more tolerant society. But it seems obvious that not everyone agrees.²⁴⁴ And those who do not could point to this change in the culture as another outgrowth of the (in their eyes) immorality of corporate tunnel vision with respect to the profit motive.

Similarly, many companies have integrated the images in their advertising to include more people of color, more women (outside of advertising for cosmetics, clothing, and the like) and have discovered it pays to recognize the Hispanic market or the African-American market.²⁴⁵ Arguably,²⁴⁶ these trends all represent social advances for which we can thank corporate indifference to anything but the profit motive.²⁴⁷ Moral neutrality may lead to the morally worthwhile as well as the morally bankrupt. And such neutrality may be desirable in a pluralistic society in which the content of terms such as the “morally

²⁴³ See, e.g., David M. Skover & Kellye Y. Testy, *Lesbigay Identity as Commodity*, 90 CAL. L. REV. 223 (2002). Many advertisers are now making one advertisement with alternate endings or elements depending on its market. See Andrew Hampp, *An Ad in Which Boy Gets Girl . . . or Boy*, ADVERTISING AGE, Aug 6, 2007, available at http://adage.com/article?article_id=119705 (last visited Aug. 6, 2007).

²⁴⁴ See Russell Shorto, *What's Their Real Problem With Gay Marriage? It's the Gay Part*, N.Y. TIMES MAG., June 19, 2005, at 34 (recounting the fierce objection on moral grounds by some anti-gay marriage activists, to homosexual behavior on the grounds of a belief that it represents an immoral choice). The stunning ignorance of history, science and any sense of the cultural context for the institution of marriage displayed by some of the subjects interviewed for this article is fairly dispiriting if one believes that good government and a good society is even, in part, dependent upon information and education. Nevertheless, it is clear that the individuals interviewed are animated by fervent convictions that they label “moral.” For another example of the profit motive contributing to equality, see Ellen Waldman & Marybeth Herald, *Eyes Wide Shut: Erasing Women's Experiences from the Clinic to the Courtroom*, 28 HARV. J.L. & GENDER 285, 300-02 (2005).

²⁴⁵ In a recent article, *Advertising Age* identified the Hispanic and Spanish language market as an area of expected growth in an otherwise somewhat flat trajectory for advertising expenditures. Nat Ives, *Media Spending Declines as Marketers Tap the Brakes*, ADVERTISING AGE, June 5, 2007, available at http://adage.com/mediaworks/article?article_id=117103 (last visited June 5, 2007).

²⁴⁶ I would say it is unequivocally a good thing except for a lingering suspicion that it may, at times, be of dubious benefit to become the target of marketing efforts. It may be good insofar as exposing others to the fact that you exist, to more realistic depictions of the world, and to raising awareness and social and political significance of a group. It may *not* be so good insofar as you may disagree with those depictions or feel the need to insulate yourself from the blandishments of relentless commercialism.

²⁴⁷ I am most definitely not suggesting that corporate self-interest has solved inequality problems or that the current advertising regime adequately or fairly represents women or people of color; far from it. I merely wish to note that some efforts to address minority markets or perceived markets have resulted in companies changing marketing practices to try to reflect more diversity.

worthwhile" and "morally bankrupt" are fiercely contested. Moreover, such categories as the moral seem to have less relevance when dealing with the marketing efforts for harmful products like cigarettes.²⁴⁸

The . . . internal mechanisms of the corporation do not differentiate between making money by creating a good product or lobbying the law to avoid the costs of a bad one. A corporation driven by the profit motive is morally indifferent [unless] those effects are not reflected in the returns to the shares.²⁴⁹

In addition to the primacy of the profit motive on behalf of the fictional shareholder that drives the corporation to externalize any costs that it can, large corporations are also bureaucracies with many of the same undesirable features of governmental bureaucracies. This may be particularly true in those industries where a handful of firms dominant the market. These large aggregations of people increase the potential to diffuse and dissipate whatever individual, human moral impulses its officers, directors, and employees may have and to contribute to the uncertainty about the moral and legal responsibilities of employees.²⁵⁰ Diffusion of responsibility and the fiduciary duty to attend to profit become convenient instruments for suppressing guilt feelings about particular transactions,²⁵¹ and they make it difficult to locate responsibility when things do go wrong.²⁵² It seems there are very good structural reasons for concern that these entities could be the source of much destructive speech. Is there a theoretical basis for offering constitutional protection to the communications of these entities?

III. THEORY AND PRACTICE IN PROTECTION OF FREEDOM OF EXPRESSION

A government should not be called upon to defend its regulation of advertising in a court of human rights²⁵³

In support of what is described as an absolutist position on the

²⁴⁸ See, e.g., Michael A. Fletcher, *Tobacco's Ties to Minority Groups Put Their Leaders in a Bind*, WASH. POST, May 17, 1998, available at <http://www.columbia.edu/itc/hs/pubhealth/p9740/readings/tobacco-fletcher.html> ("Native Americans and African Americans have the highest smoking rates in the nation, and African Americans are more likely than others to die from smoking-related diseases.").

²⁴⁹ Greenwood, *supra* note 109, at 1053 (emphasis added).

²⁵⁰ See, e.g., O'Donnell, *supra* note 141.

²⁵¹ See, e.g., Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS, *supra* note 27, at 431, 448-50.

²⁵² *Id.* at 450-52.

²⁵³ SHINER, *supra* note 129, at 3.

protection of free speech, First Amendment purists are fond of paraphrasing a saying attributed to Voltaire, "I disagree with everything you say but will defend to the death your right to say it." However, at no time in this country's history has anything like an absolutist position on the application of the First Amendment ever held sway in the government or with the Supreme Court.

To the contrary, when reviewing Supreme Court decisions on issues of speech, one is left with the uncomfortable feeling that the government is willing to permit the hostile speech of ineffectual crackpots and malcontents and is very much less sanguine about protecting speech that poses a threat to some government project or plan.²⁵⁴ Still, this observation also highlights the fact that one of the principal concerns supporting the right to freedom of expression is concern about the mandate of a governmental orthodoxy.²⁵⁵

Whether the commitment to protecting freedom of expression in fact is real or rhetorical, it has never been the case that all speech was equal for purposes of protection under the First Amendment.²⁵⁶ For

²⁵⁴ For example, although Cohen's "Fuck the draft" jacket and flag burning have been protected, much more significant political expression, such as in the work place, has not received similar protection. And the War on Terror has provided a basis for arguing the sort of exigency that overcomes what would ordinarily be more clearly protected speech. For example, the Bush Administration asked the National Academy of Sciences to refrain from publishing a work on biological terrorism by a Stanford researcher on the grounds that "[t]he paper . . . details how terrorists might attack the nation's milk supply with botulinum toxin and offers suggestions for how to thwart such an attack." Kelly Field, *Federal Officials Ask Journal Not to Publish Bioterrorism Paper*, CHRON. OF HIGHER EDUC., June 17, 2005, at A11. Academic publications are typically viewed as quintessential protected speech. Burt Neuborne has similarly observed that First Amendment protection tends to be extended mostly to the "weak and vulnerable speakers of conscience." Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 13-14 (1989). "When a speaker becomes too effective, we have not hesitated to override the hearer-centered underpinnings of free speech at the point where the toleration level of the society is exceeded by the perceived threat latent in unpopular political, religious, or aesthetic speech." *Id.*

²⁵⁵ "[T]he First Amendment 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.'" Brief for the Petitioners, *supra* note 147, at 50. See also Jonathan Rauch, *Corporate Lying Is Bad. But Allowing It Is Good*, ATLANTIC MONTHLY, June 7, 2003; Assoc. Press, *If Nike Suit Upheld, a Critic Becomes a Censor*, *Solicitor Says*, U.S.A. TODAY, June 28, 2003, available at <http://www.usatoday.com/money/industries/retail/2003-04-23-nike-s>. It was also raised in the amicus brief filed by some 40 media organizations. See Brief Amici Curiae of Forty Leading Newspapers, Magazines, Broadcasters, Wire-Services, and Media-Related Professional and Trade Associations in Support of Petitioners, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 835613 (arguing that a decision for Kasky would represent an undesirable chill on news sources from corporations as well as resulting in a lack of balance in reporting on issues).

²⁵⁶ Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (describing various categories left relatively untouched by First Amendment law and arguing that boundaries are drawn more from nonlegal factors than legal doctrines); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 270-71 (1981) (earlier exploration of coverage/non-coverage issue) [hereinafter Schauer, *Categories*]; see also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 21 (1971) ("In framing a theory of free speech

example, there has never been (at least in theory) a First Amendment defense to a fraud claim, to an offer of a bribe, or to a solicitation of a murder.²⁵⁷ Threats have also sometimes been deemed unprotected by the First Amendment.²⁵⁸ These may be acts committed by speech, but, as noted, these speech acts are not protected by the First Amendment.²⁵⁹ Until fairly recently, commercial speech fell into this unprotected category. Commercial speech and speech by corporations (the definition of what constitutes “commercial speech” is contentious and unsettled),²⁶⁰ was only extended protection in the late 1970s.²⁶¹ Thus, there is no venerable tradition supporting freedom of expression for the conduct of commerce.²⁶²

So what sort of speech is protected and why? In so complicated an area where no hard and fast lines exist, it is not really possible to fully answer this question; the scope of protection appears to have always been a work in progress, a tug-of-war between political currents and powerful interests. However, it is possible to identify some of the theoretical grounds for protection of freedom of expression generally, even if the practical application of those theories presents distinct

the first obstacle is the insistence of many very intelligent people that the ‘first amendment is an absolute’. . . . Any such reading is of course impossible.”).

²⁵⁷ An interesting issue is raised by whether publishing a book that might be described as a how-to manual for hit men constitutes such solicitation for murder. In one case, the 4th Circuit held that it did. *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997). For a discussion of the case, see ROD SMOLLA, *DELIBERATE INTENT* (1999). For a discussion of the First Amendment treatment of crime facilitating speech generally, see Eugene Volokh, *Crime Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

²⁵⁸ *R.A.V. v. St. Paul*, 505 U.S. 377 (1997) (describing the threats exception but declining to apply it in this case). For a discussion of this area, see Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337 (2006).

²⁵⁹ See *supra* notes 256-258.

²⁶⁰ For an excellent discussion of the definition problem, see Erwin Chemerinsky & Catherine Fisk, *What is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143 (2004). While I do not agree with the place where the authors draw the line between what constitutes commercial speech (since I would include all for-profit corporate communication, including that in the editorial format), this article clearly outlines the current doctrinal ambiguities.

²⁶¹ The *Virginia Pharmacy* decision in 1976 is generally credited with establishing the commercial speech doctrine because it was in this decision that the Court first articulated a developed theory for some limited protection for commercial speech. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 760 (1976). However, another candidate is the earlier decision of *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975), in which the Court held that a newspaper publisher could not be prohibited by the criminal law from running an advertisement noting the availability of abortions in New York that were illegal in Virginia. But because the Court’s holding was identified as “limited” it was not really clear what the parameters of protection for commercial speech were, or on what theory it was grounded, until *Virginia Pharmacy*. See *Virginia Pharmacy*, 425 U.S. at 760.

²⁶² See Baker, *Paternalism*, *supra* note 139, at 1162 (“[O]ur strongest advocates of free speech [John Stuart Mill, Thomas Emerson, and Hugo Black] each consistently rejected granting any protection to commercial speech. . . . Neither Mill nor Black nor Emerson saw freedom of speech as about, or as including, a business’s speech promoting its sales and profits.”).

problems. Thomas Emerson, the prominent First Amendment theorist, proposed four purposes for protecting freedom of expression, and despite many subsequent refinements of this formula or arguments favoring one or the other of these values, Emerson's architecture of the theory for why freedom of expression is protected remains one of the most comprehensive and influential.²⁶³

First, Emerson claimed freedom of expression is a necessary part of self-expression and, thus, of personal fulfillment.²⁶⁴ Second, as has been repeated in numerous court decisions and academic writings, freedom of expression is thought to be the best method of ensuring discovery of truth.²⁶⁵ (It was on this ground, refusal to shield consumers from the truth that a limited amount of protection for commercial speech was extended in the first place.)²⁶⁶ Third, Emerson argued that protection for speech offers a basis for participation in a democracy.²⁶⁷ Finally, Emerson argued that freedom of expression helped maintain a balance between impulses to change and those to stabilization in a society.²⁶⁸ All four of these rationales have been offered in support of freedom of commercial speech.²⁶⁹ Upon examination, however, none of them justifies protection for freedom of commercial expression.

In addition, supporters of commercial speech have argued that the failure to protect it (and in the context of cases like Nike, protection has taken the form of a claim for immunity from liability for false

²⁶³ See JOHN H. GARVEY & FREDERICK SCHAUER, *FIRST AMENDMENT: A READER* 35-167 (2d ed. 1992) (discussing primarily Emerson's structure in chapter II, *Philosophical Foundations of Freedom of Speech*, and introducing variations and other arguments in Chapter II, section F, entitled *Additional Perspectives*).

²⁶⁴ Emerson, *supra* note 18, at 878.

²⁶⁵ *Id.* at 878. This argument was repeated by Nike and by most of the amici supporting Nike. See *supra* note 255. But see Richard A. Posner, *Bad News*, N.Y. TIMES BOOK REV., July 31, 2005 (offering the opinion that the market for news does not necessarily produce the truth even if it produces the opportunity to receive information from which one can synthesize the truth).

²⁶⁶ See *Virginia Pharmacy*, 425 U.S. at 763-65.

²⁶⁷ Emerson, *supra* note 18, at 878. This argument is also the one offered by Alexander Meiklejohn in his influential writing on First Amendment theory. See, e.g., Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961). It is worth noting that Meiklejohn's observation, that the First Amendment does not require that every citizen speak to all issues, "but that everything worth saying shall be said," also seems to be based on notions that allowing everything worthwhile will be a better route to discovery of the truth since it is hard to imagine that worthwhile does not encompass "true" as part of its value, although it may not be either a necessary or complete description of what Meiklejohn thought "worthwhile" meant. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948).

²⁶⁸ Emerson, *supra* note 18, at 878-79. To make things even more complicated, Schauer, like Shiffrin, argues that it may be a mistake to look for a single core value rather than a multiplicity of values underlying protection for speech. Schauer, *Categories*, *supra* note 256, at 276-77.

²⁶⁹ Professor James Weinstein offered one of the latest rebuttals of the first two arguments. According to Weinstein both the self actualization and truth theories are supported by the case law. See James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons From Nike v. Kasky*, 54 CASE W. RES. L. REV. 1091, 1100-01 (2004).

statements) will result in bad policy consequences with respect to corporate transparency and social responsibility reporting.²⁷⁰ A failure to engage in social responsibility reporting, it is argued, will have a negative impact on commercial relations with Europe to the extent that such transparency is required in order to do business there.²⁷¹ It has also been argued that a failure to offer the same protection to business that is offered to its critics would be “unfair” and represent an “imbalance” in the debate.²⁷² (This is perhaps a variation on the theory that more open debate is more likely to lead to the truth). Each of these arguments will be discussed in more detail below.

First, Emerson’s basic structure should be applied to the corporation as speaker to determine the source of a claim to rights. Although the commercial speech doctrine focuses on analyzing content that is defined as “commercial,” as a category it overlaps with corporate speech, which focuses on the speech rights of a corporation as an entity.²⁷³ Thus, some speech that is “commercial” is offered by non-

²⁷⁰ See Brief for the Petitioners, *supra* note 147, at 39 (noting that Nike had not released its Corporate Responsibility Report because of fears of liability unless the California Supreme Court’s decision was overturned). Not everyone agrees that the decision hurts corporate social responsibility reporting. There is some argument that without the ability to test the truth of such reporting, its usefulness will be minimal. See Adam M. Kanzer & Cynthia A. Williams, Commentary, *The Future of Social Reporting Is On the Line*, BUS. ETHICS Summer 2003, available at http://dominiadvisor.com/advisor/About-Domini/News/Press-Release-Archive/Nike_Kasky_Oped_6-03.doc_cvt.htm (“[V]irtually everything a company says is commercial speech, and must be accurate.”). We might have some reason to question the sincerity of Nike’s alleged reluctance to issue a Corporate Responsibility Report since it in fact issued one for 2004 despite the fact that although it had settled the *Kasky* case, the judicial precedent from the California Supreme Court, with its allegedly “chilling” definition of commercial speech, has not been withdrawn and is still the law. See Press Release, Nike, Nike Issues FY04 Corporate Responsibility Report Highlighting Multi-Stakeholder Engagement and New Levels of Transparency, (Apr. 13, 2005), http://www.nike.com/nikebiz/news/pressrelease_print.jhtml?year=2005&month=04&letter=a. Of course Nike’s renewed confidence in the safety of such reporting may be due to their success in contributing to an effort in California to pass law reform to remove the private attorneys general provision that allowed *Kasky* to sue on behalf of the citizens of California. See Proposition 64, 2004 Cal. Legis. Serv., <http://vote2004.ss.ca.gov/voterguide/propositions/prop64text.pdf> (approved by voters on Nov. 2, 2005). Now with only the state and federal government able to sue, perhaps Nike’s management feels that with appropriate lobbying efforts there is not much to fear from the government and, given the response to their arguments, another lawsuit might simply offer them the opportunity to get from the courts the additional protection they seek. Ironically, the 2004 Corporate Responsibility Report’s disclosures suggest that *Kasky*’s allegations may have been true.

²⁷¹ See, e.g., Thomas H. Clarke, Jr., *Will Nike v. Kasky Ignite Corporate Social Responsibility Trade Wars between the U.S. and European Union?*, SRI MEDIA CORPORATE GOVERNANCE NEWS, June 28, 2003 (“Those companies that do not publish CSR reports, or generally obfuscate their positions on matter diverse as global warming to supply chain economics, will be much less inclined to publicize their progress for fear of California litigation.”) (on file with author).

²⁷² See, e.g., Brief Amici Curiae of Forty Leading Newspapers, Magazines, Broadcasters, Wire Services, and Media-Related Professional and Trade Associations in Support of Petitioners, *supra* note 255.

²⁷³ See, e.g., *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530 (1980).

corporate entities like individuals, partnerships, limited liability companies, and so forth. As it stands now the commercial speech doctrine focuses on the commercial nature of the speech and whether the speaker is a commercial entity, depending on what decision is used as support, is either only one factor that is not dispositive²⁷⁴ or it is an irrelevant factor because the government ought not to discriminate by speaker.²⁷⁵ Here I am concerned with the commercial speech of for-profit corporations, and so I will consider Emerson's theoretical supports from the perspective of this sort of speaker.

Similarly, current doctrine has it that a for-profit speaker can issue speech that is not commercial, that is, speech about an issue of public concern that is political, and so not all corporate speech is commercial.²⁷⁶ I argue here that while not all speech by an entity organized as a corporation is commercial, since many not-for-profit and advocacy groups assume a corporate form, all speech by a for-profit corporation is commercial since, by virtue of the rules governing for-profit corporations a for-profit corporation has no legitimate purpose other than commerce.²⁷⁷ By definition all of its speech is commercial whether it appears to be or not because as a non-human entity it only has the interests that the laws governing its establishment dictate to it, and those laws dictate that its establishment be to conduct business. So even when Exxon-Mobil talks about global warming its purpose is always and inherently commercial. Unlike human beings, corporations are not ends in themselves or moral subjects.²⁷⁸ They are instrumental, legal formations of persons and capital organized to do business. When applying Emerson's theory about First Amendment values to the for-profit corporation it does not appear that extending these rights to for-profit corporations would advance or support those interests Emerson discusses.

²⁷⁴ *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 67 (1983) (presence of an economic motive alone does not make speech "commercial"); *Kasky v. Nike, Inc.*, 45 P.3d 243, 311 (Cal. 2002) (discussing factors which make speech "commercial" for purposes of the doctrine).

²⁷⁵ "The inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

²⁷⁶ See, e.g., *Bellotti*, 435 U.S. at 783 n.18 (describing dissenter Justice's White's view that corporate expenditures be "integrally related to corporate business operations" as undesirable because of the prospect that corporate communications related to educational, charitable or cultural causes might be chilled, but without discussing what motives other than a business purpose a corporation would ever have for engaging in such speech).

²⁷⁷ See also Bennigson, *supra* note 4, at 395.

²⁷⁸ Even the most devoted proponents of freedom of expression for organizations do not appear to take the position that legal fictions like corporations have inherent or intrinsic moral worth, but rather that protection for these entities will further human flourishing. See, e.g., MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984).

A. Self-realization

As a non-human entity, a corporation lacks the expressive interests related to self-actualization and freedom that human beings possess by virtue of being human. Human beings are moral subjects and ends in themselves.²⁷⁹ Corporations are not. And despite the extension to corporations of personhood, that personhood has not extended to courts concluding that they are entitled to all of the same protections applicable to human beings. For example, corporations have no right against compulsory self-incrimination²⁸⁰ and no right of privacy²⁸¹ because these rights are said to be “purely personal.”²⁸² Freedom of expression as a function of self-actualization or self-determination would seem to be similarly personal. As Emerson put it, the right to freedom of expression is necessary to human beings because:

[E]xpression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.²⁸³

Corporations do not have a “self” to be actualized or affirmed.²⁸⁴ Their employees may have them. Their shareholders may have them. But corporations themselves do not. When a corporation’s agents speak on its behalf they are not expressing themselves, they are acting as agents to advance the corporation’s ends. And if that corporation is a for-profit one, its ends are profit, however its management defines it.²⁸⁵

²⁷⁹ As indicated above, there are a number of sources for this position of the “natural rights” theory, whose most prominent early proponent of influence on the Framers was probably John Locke. Locke posited that human beings belonged to God and as such should not interfere with one another’s lives, health, liberty, or property because human beings “being furnished with like faculties . . . cannot be supposed any such subordination” as between each other “as if we were made for one another’s uses, as inferior ranks of creatures are for ours.” JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, reprinted in *POLITICAL WRITINGS OF JOHN LOCKE* 6, David Wootton ed., 1993). In his introduction to this volume Wootton describes the American Constitution as “founded on Lockean principles.” *Id.* at 8. See also David L. Wardle, *Reason to Ratify: The Influence of John Locke’s Religious Beliefs on the Creation and Adoption of the United States Constitution*, 26 SEATTLE U. L. REV. 291 (2002). And as Eduardo Peñalver has persuasively argued, a natural rights approach can be consistent with both “a robust sphere of individual autonomy and with active state regulation.” Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L. J. 732 (2007).

²⁸⁰ *Wilson v. United States*, 221 U.S. 361 (1911).

²⁸¹ *Cal. Bankers Ass’n v. Schultz*, 416 U.S. 21 (1974).

²⁸² *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978).

²⁸³ Emerson, *supra* note 18, at 879.

²⁸⁴ For a wonderful discussion of this issue from the perspective of the absence of an author, see Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735 (1995). Professor Bezanson’s objection extends beyond the for-profit institutional speaker.

²⁸⁵ What constitutes the profit and the proper perspective from which to analyze that question is not uncontroversial and could itself be the subject of a separate paper. Suffice it to say that it is

From this perspective:

[c]orporate speech is coerced, not free. It is compelled, legally mandated speech, not the result of anyone's autonomous behavior. It does not reflect the views of shareholders, nor, if management is acting in good faith, those of managers or other corporate agents. Instead, corporate speech reflects the hypothetical interests of a creature given reality by the market and the law: the fictional shareholder.²⁸⁶

The fictional shareholder is just that, a fiction—a mental construction no more embodied than the “+” in an equation. A corporation's “principal is merely a principle, an abstraction, not a human being. [P]rinciples, unlike principals, do not have any autonomy rights to be respected.”²⁸⁷

Nor do the people speaking on behalf of the corporation have autonomy rights with respect to their expression since it is not their own expression. However much their own creativity and interests may align with the corporation's, at the end of the day, they are agents speaking on the corporation's behalf—following orders—albeit the implicit orders dictated by their fiduciary duties. “[P]eople who are just following orders are neither full moral subjects nor appropriate participants in the difficult debates of the political forum.”²⁸⁸ Thus, if there is a justification for the protection for commercial speech, self-expression, does not seem to be a part of that justification—at least not speaker self-expression.²⁸⁹

But what about listener self-expression? After all, it was the rights of the listeners that the Court in *Virginia Pharmacy* emphasized. Perhaps the Court was influenced by Professor Martin Redish's

ultimately material and economic, whether increasing shareholder value in the form of stock value, increased net profits, rate of return, stability, growth or any number of other economic measures. To the extent intangibles like reputation, goodwill and image can be materialized into economic value these things count as well. But it is the intangible as it translates into the tangible economic reality, not the intangible for its own sake.

²⁸⁶ Greenwood, *supra* note 109, at 1002.

²⁸⁷ *Id.* at 1056.

²⁸⁸ *Id.* at 1057.

²⁸⁹ As Professor David Vladeck notes, the Supreme Court appears to have incorporated some notion of speaker's rights into the commercial speech doctrine, despite the absence of this element in the earlier law, in two recent cases. See David Vladeck, *Lessons From a Story Untold: Nike v. Kasky Reconsidered*, 54 CASE W. RES. L. REV. 1049, 1072-73 (2004) (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002)). While this is definitely a shift in the doctrine it appears to have been an under-theorized one and there is no telling if it is deliberate or will be permanent. In neither case did the Court acknowledge explicitly that it was introducing a justification not found in the foundational cases. Instead, the Court appeared to assume that it was self-evidently true that the doctrine protected this interest. This is not surprising, given the metaphor of corporate personhood. One of the goals of this article is to expose this shift as a departure from the original justifications for the doctrine and one with potentially far reaching consequences that it is not clear that the Court has fully considered, given that the shift was not remarked.

observation that “the function of self-rule²⁹⁰ is fostered by the receipt of information that enables the individual to make life-affecting decisions in a more informed fashion.”²⁹¹ In other words, perhaps by giving corporations freedom to speak, more information (or at least social material, if not strictly speaking “information”) is generated that in turn supports the goal of self-actualization or development. One might call this the self-expression by proxy argument. There may be something to this.²⁹² This argument makes the speech generated by corporations a sort of clay from which individuals can mold their statements about self.²⁹³ On the one hand it seems undeniable that advanced capitalism offers a dizzying array of material from which to craft a personal identity, particularly if one focuses on self-expression in the realm of consumer choices.

On the other hand, one might be skeptical about how broad, ideologically speaking, the array of choices actually is. And even if we assume it is very broad, what if there are significant social costs, for example environmental pollution or child labor, associated with the provision of that array of consumption choices that supposedly supports self-expression? Are these social costs offset by the benefit of being able to use this speech as material for self-expression? It seems difficult to assess such speculative benefits in order to balance them against concrete harms like poisonous products, environmental degradation, or other potentially negative consequences.

And what of the situation where a company imbues a brand with misleading social meaning that means it is not exactly the clay for self-expression it purports to be? For example, if the maker of sportswear advertises and promotes its brand as “sweatshop free,” it does so with the theory that some consumers will base their purchasing decisions on such representations in furtherance of the creation of an identity that includes, among other implicit claims, “I support fair labor practices.”²⁹⁴

²⁹⁰ The term “self rule” seems to invoke both the democracy concerns and the autonomy or self-realization concerns.

²⁹¹ Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply To Professor Baker*, 130 U. PA. L. REV. 678, 682 (1982).

²⁹² For arguments in this vein, see JAMES B. TWITCHELL, *ADULT USA: THE TRIUMPH OF ADVERTISING IN AMERICAN CULTURE* (1996).

²⁹³ Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235 (1998).

²⁹⁴ Although there is some evidence that, as with much self-reporting that involves potentially moral claims, what people say will influence their decision-making process and their actual behavior may diverge. Andreas Chatzidakis, Sally Hibbert & Andrew P. Smith, *Why People Don't Take Their Concerns about Fair Trade to the Supermarket: The Role of Neutralisation*, 74 J. BUS. ETHICS 89 (2007). But see Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004) (arguing that to the extent people do match convictions to purchasing decisions, there is no convincing reason to honor consumer preferences with respect to the characteristics of the product but not with respect to the process by which it was made). See also Douglas A. Kysar,

However, if the company's actions are not consistent with those representations, how does the promotion of this image further the creation of identity and self-expression among those consumers who purchase its product with the belief that they are making a statement about their values? Their purchases are supporting the perpetuation of labor practices that they actually intended to disavow with their purchases. This outcome would seem to *violate*, not vindicate, the justificatory principle of self-expression by proxy. This is precisely where the government may have a role to play by attempting to ensure that the products consumers buy in order to express themselves are truthfully labeled, promoted, described, and marketed so that the consumer can effectively signal their preferences to manufacturers as well as the world at large.

B. *Truth*

The value that is most often associated with protection of commercial speech however is truth. *Laissez-faire* in the marketplace of ideas is said to lead to the production of more truth.²⁹⁵ But of all the justifications offered in support of freedom of commercial speech (or more accurately, freedom from liability) this one might be the least convincing. Because of gross imbalances in resources, incentives, and opportunities to speak, broad protection for commercial speech seems far more likely to lead to *less* truth rather than more.

In the conventional recitation of the truth theory it is only through an open exchange of ideas and information that the truth is most likely to emerge.²⁹⁶ Virtually all of the variations on the theoretical framework proposed by Emerson turn around this idea that truth, or at least the individual's truth as expressed through their choices

The Expectations of Consumers, 103 COLUM. L. REV. 1700 (2003).

²⁹⁵ I have written another article about the problems with this argument. Tamara R. Piety, *Market Failure in the Marketplace of Ideas: Commercial Speech and the Problem that Won't Go Away*, LOY. L.A. L. REV. (forthcoming 2008). Simply because information is truthful does not mean it will be important, relevant, useful or sufficient in all cases. (I have Curtis Bridgeman to thank for this insight.) Moreover, if we are to judge by the popularity of an idea it is unclear that, as an empirical matter, the truth will out since so many popular ideas are manifestly untrue. So the conventional invocation to this value is probably as much about the perceived value of non-interference by government as it is about any confidence that the public will generally recognize and accept "the truth" in most or even many cases. And this is even quite apart from the obvious difficulties in defining truth.

²⁹⁶ "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting). For a discussion of the reasons for doubt about this proposition from an empirical standpoint, see Alvin I. Goldman and James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996).

representing individual utility maximization, will best find expression or satisfaction through minimal restraint on the so-called marketplace of ideas. This is also the basis of the argument made by one of the most prominent proponents of freedom of commercial expression, Professor Martin Redish.²⁹⁷ "Information received in the commercial context . . . is specifically designed to assist the individual in the decision-making process."²⁹⁸ On the other hand, traditionally, the law has prohibited false commercial speech on the theory that there are social and economic costs associated with false (or even misleading) commercial speech and that the government appropriately has a role in enforcing truth in this context.

However, much of the speech issued by for-profit corporations is persuasive speech that is not necessarily informative and so may not be easily categorized as either true or false. Indeed, one would be hard-pressed to identify the information in much advertising. As Professor Redish noted in 1971, even "[a] cursory examination of current television and periodical advertising reveals that in practice, comparatively little commercial promotion performs a purely informational function."²⁹⁹ Doing a similar cursory examination today merely confirms his observation that commercial advertising (which is what Redish was describing, not public relations or advocacy speech), is even less informative now than it was in 1971. And for the reasons explored above, it is difficult to conclude that for-profit corporations will ever disseminate unfavorable information except under compulsion.³⁰⁰ So it is not clear that by offering more protection to commercial speech, more truth is likely to be produced. False speech by contrast can hardly be viewed as contributing to discovery of truth even if it contributes to the palette of available symbols for self-expression.

Nevertheless, Professor Redish's arguments persuaded the Supreme Court, which, in the main, adopted the justification he offered for the protection of commercial speech (along with his proposed limitations) when it decided that the public did indeed have as much interest in hearing correct price information as it did in hearing about the news of the day.³⁰¹ It was on this basis, the consumer's right to

²⁹⁷ See Redish, *supra* note 75. In fact, he also convincingly folds self-government into self-actualization claiming that Emerson's third value is really just a manifestation of the first value. *Id.* at 439.

²⁹⁸ *Id.* at 445.

²⁹⁹ *Id.* at 433.

³⁰⁰ See *supra* notes 236-242 and accompanying text (discussing Merck's calculation of the costs of disseminating information about the heart risks of Vioxx).

³⁰¹ As the Court in *Virginia Pharmacy* noted, "[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*,

receive truthful information, that the Court extended a limited protection to commercial speech.³⁰² Note that self-expression for the corporation itself played no analytical part in the justification for this extension. The right that was protected was that of the listener. Despite expanding the category of protected speech to encompass speech not previously protected, the Court reserved to the government the right to regulate commercial speech for its truth on the theory that commercial speech was harder than other types of protected speech and thus was less likely to be chilled by appropriate regulation to control fraud.³⁰³

If it is the public interest in the production of truth that justifies and explains the *Virginia Pharmacy* decision, it would seem, as the Court indeed found, this justification similarly offers a basis for governmental regulation of speech which is only misleading or deceptive but not necessarily provably false in whole or in part.³⁰⁴ Where, as with for-profit corporations, structural incentives clearly slant toward persuasive communication, whether or not it is truthful³⁰⁵ and there are powerful and pervasive incentives to misrepresent, the truth production function of protection for freedom of expression does not seem to offer a strong basis for protecting commercial speech without some very clear social benefit to be derived. The social benefits of unrestrained commercial speech, if limited to its claimed informational nature, appear dubious. And it is clear from reading literature in marketing itself that many practitioners do not view that what they are engaged in providing is informational. Some marketing professionals openly claim that truth is irrelevant to sales.³⁰⁶ In light of the above discussion of corporate incentive structures, this is not an astonishing observation. Rather, it is the predictable and intuitive outcome which an even slight familiarity with marketing practices substantiates. Given that consumers have a limited amount of time and limited access to reliable information from

425 U.S. 748, 763 (1976).

³⁰² "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 770-72 (citations omitted). See also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 572 (1980) (holding that in order for commercial speech to be protected by the First Amendment the speech "must concern lawful activity and not be misleading").

³⁰³ *Virginia Pharmacy*, 425 U.S. at 771 n.24.

³⁰⁴ *Id.*

³⁰⁵ See, e.g., Sarah C. Haan, *The "Persuasion Route" of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281 (2000).

³⁰⁶ "The facts are irrelevant. In the short run, it doesn't matter one bit whether something is actually better or faster or more efficient. What matters is what the consumer believes." SETH GODIN, *ALL MARKETERS ARE LIARS: THE POWER OF TELLING AUTHENTIC STORIES IN A LOW-TRUST WORLD* 6 (2005). See also Lew McCreary, *Lies, Damn Lies and Puffery*, CMO MAGAZINE, July 2005.

which to assess marketing claims, it is equally clear why, for marketers, persuasion may not entail truth. This is quite apart from whether marketing operates on non-rational thought processes in the first place.³⁰⁷

If corporations have a duty to communicate in ways that will enhance shareholder value by generating profits and good publicity, and if they are permitted to communicate false information that will generate value and can do so without legal consequences, then they will predictably do so.³⁰⁸ In fact, even with existing laws governing fraud and corporate statements, a corporation still might decide that it is not cost effective to follow the law.

Consider the case of Phillip Morris. On September 22, 1999, the United States brought a RICO case against Phillip Morris and several other tobacco companies, as well as some of their not-for-profit public relations and research organizations, alleging a conspiracy to commit fraud to endanger the lives of millions of Americans by concealing or misrepresenting the evidence of the negative health consequences of smoking.³⁰⁹ The government alleged that “[i]n order to avoid discovery

³⁰⁷ There is ample evidence that marketers explicitly do *not* spend much time trying to appeal to potential buyers' rationality. There is a huge literature of this topic in a number of fields. A few current works of interest that summarize some of the literature are: ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* (1984) (discussing what he calls the “automatic influence” of certain techniques used by marketers); CLOTAIRE RAPAILLE, *THE CULTURE CODE* (2007) (describing his approach to discovering what motivates people as stemming from the “reptilian brain”; Dr. Rapaille has been much sought after by marketers); FRANK LUNTZ, *WORDS THAT WORK* (2007) (discussing the influence of word choice in marketing and politics that is not, for the most part a product of reflection but rather is unthinking and reflexive). I have written at some length about this aspect of advertising in another piece, Tamara R. Piety, “*Merchants of Discontent*”: *An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE L. REV. 377 (2001).

³⁰⁸ Some of the problems with respect to counterfeits and adulterated goods coming from China have been attributed by some observers to the absence of effective regulatory oversight in China. See David Barboza, *When Fakery Turns Fatal: Food Scare Raises Questions About Chinese Entrepreneurs*, N.Y. TIMES, June 5, 2007, at C1, C4, available at <http://www.nytimes.com/2007/06/05/business/worldbusiness/05fakes.html?scp=1&sq=when+fakery+turns+fatal&st=nyt>. In addition, U.S. law currently permits sellers to make some concededly false statements if they can be characterized as “puffing”—that is, assertions so obviously inflated that no rational person would believe they were literally true. See, e.g., Piety, *supra* note 307, at 394-96 (2001) (describing puffing doctrine); David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006) (article examines puffing doctrine and recommends presumptive liability for false statement in the absence of better knowledge about how puffing effects listeners as well as evidence of speakers' intent to manipulate consumer responses). Why human beings believe or are motivated by things that they not only rationally should not be but which they affirmatively disclaim is somewhat mysterious. See, e.g., CIALDINI, *supra* note 307, at 115 (discussing the perplexing question of why, despite professed distaste for canned laugh tracks and identification of them as “phony,” people respond to canned laugh tracks in television programming by rating the material in which they appear as funnier and laughing longer than in that material which does not contain them).

³⁰⁹ See First Amended Complaint for Damages and Injunctive and Declaratory Relief ¶¶ 2-3, *United States v. Phillip Morris*, 449 F. Supp. 2d 1 (D.D.C. 2006), (No. 99-C V-02496 (GK)), 1999 U.S. Dist. Ct. Pleadings 2496C.

of their fraudulent conduct and the possibility that they might be called to account for their conduct, defendants engaged in a widespread scheme to frustrate public scrutiny by making false and deceptive statements and by concealing documents and research that they knew would have exposed their public campaign of deceit.”³¹⁰ What was defendants’ motive? “[T]he shared goals of maximizing their profits.”³¹¹

The tobacco companies largely furthered this conspiracy by maintaining that the question of whether smoking had negative health questions was a matter of debate. Of course today we know the negative health consequences of smoking are beyond debate. And according to many they were beyond debate for several decades, long after the tobacco companies continued to insist that it was an open question.³¹² But the companies kept up a relentless public relations campaign intended to create the impression that whether smoking was bad for your health was an open question.³¹³

Discovery revealed that much of what was characterized by defendants as offered in aid of debate was in fact intended to obfuscate the question or to distract the public from the known dangers of smoking. Defendants’ own documents suggested that they wanted to *conceal* information, not provide it. That pattern of concealing evidence or violating the law did not end with the collapse of the health consequences debate. It continued in the claims that nicotine was not addictive or that the industry was not intentionally attempting to market to children. Both of these claims were belied by the tobacco companies’ internal communications.³¹⁴ Perhaps it is should be no surprise that some documents never made it into discovery.

On July 21, 2004, Judge Kessler ordered Phillip Morris to pay a discovery sanction of \$2.75 million for destruction of evidence. The sanction was assessed because the judge found that Phillip Morris’s failure to comply with a court order requiring document retention reflected “reckless disregard and gross indifference by Phillip Morris and its parent Altria Group toward their discovery and document preservation obligations.”³¹⁵ The evidence the defendants had

³¹⁰ *Id.* ¶ 5.

³¹¹ *Id.* ¶ 4.

³¹² See, e.g., ALLAN M. BRANDT, *THE CIGARETTE CENTURY* 159-207 (2007).

³¹³ Apparently the companies believed it was never too soon to start creating this impression as, according to the final opinion from Judge Kessler, between 1971 and 1973 one company sent more than 1,000 copies of a pamphlet entitled “Smoking/Health An Age Old Controversy” to school children. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 189 (D.D.C. 2006).

³¹⁴ *Id.* at 218-286 (regarding knowledge of nicotine’s addictive properties and denial of same, including in testimony before Congress), and at 561-691 (regarding marketing to youth despite denials of same).

³¹⁵ See *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 26 (D.D.C. 2004).

destroyed was email that an earlier court order required them to preserve. Pursuant to defendants' document destruction policy (or so they claimed) that email was destroyed. Later, when the defendants discovered these records had been destroyed, they nevertheless failed to notify the government and the court of that fact for several months.³¹⁶

Why would a good corporate citizen³¹⁷ flout a court order? Could Phillip Morris be a rogue company?³¹⁸ An explanation for this behavior might be found in the judge's own opinion. She noted that it was difficult to calculate the proportional sanction that the rules of civil procedure required³¹⁹ "because we have no way of knowing what, if any value those destroyed emails had to Plaintiff's case"³²⁰ In other words, there was no way of knowing how valuable to plaintiff's case the destroyed evidence was. However, it was possible to look at what was at stake for defendants. The government had originally sought \$280 billion in damages. Although a later appellate court ruling required that the claim be reduced because the appellate court concluded the statute only permitted forward-looking damages,³²¹ this decision did not eliminate the possibility that defendants' liability would ultimately run into the billions, not the millions of dollars. Given the potential exposure, \$ 2.75 million would surely be a small price to pay if the evidence that was destroyed reduced the probabilities of a multi-billion dollar verdict.³²² Of course destruction of the evidence is wrong, illegal,

³¹⁶ *Id.*

³¹⁷ "The Altria family of companies is firmly committed to pursuing its business objectives with integrity and in full compliance with the law." Altria Company, Societal Expectations, http://www.altria.com/responsibility/4_2_complianceandintegrity.asp (last visited August, 10, 2005). See also Altria Company, Understanding Social Expectations, http://www.altria.com/responsibility/4_4_societalexpectations.asp (description of commitments to various "stakeholders" beyond shareholders).

³¹⁸ Perhaps since the tobacco companies produce a legal product that predictably kills a certain percentage of their customers; the designation "rogue" may be difficult to avoid.

³¹⁹ See FED. R. CIV. P. 37(b)(2)(A) (2008) ("If a party . . . fails to obey an order to provide or permit discovery . . . the court . . . may issue further just orders.").

³²⁰ *Phillip Morris USA*, 327 F. Supp. 2d. at 26.

³²¹ See *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1193 (D.C. Cir. 2005). The additional difficulty with the ability to adequately deter corporate misconduct, even with existing laws and regulations, was highlighted when in early June of 2005 the government announced it was inexplicably backing off of its revised damages claim in excess of \$100 billion, in favor of only \$10 billion.

³²² In fact the defendants got a further break when the government voluntarily scaled back its damages request from \$130 billion to \$10 billion. The government lawyers defended the move on the grounds that the court of appeals limitation of damages to forward-looking damages made a larger request unlikely to be sustained. This explanation was met with skepticism in some quarters and the allegation that the change was politically motivated. Eric Lichtblau, *Lawyers Fought U.S. Move to Curb Tobacco Penalty*, N.Y. TIMES, June 16, 2005, at A1 ("At the close of a major trial that dozens of Justice Department lawyers spent five years preparing, the department stunned a federal courtroom last week by reducing the penalties sought against the industry, from \$130 billion to \$10 billion, over accusations of fraud and racketeering."), available at <http://www.nytimes.com/2005/06/16/politics/16tobacco.html?scp=1&sq=Lawyers+Fought+U.S.+>

and sanctionable. And it was duly punished in this case. But it is easy to see, even as a hypothetical matter, that the economic trade-offs in specific cases may represent a well nigh irresistible temptation to violate discovery orders and pay damages rather than run the risk of greater liability down the road. Incentives do not seem very well aligned with truth production even in the context of a court action where there is a legal duty to produce it. How sanguine can we be that truth will be produced in less stringent contexts like the issuance of promotional materials?

Apart from the ubiquitous profit motive as an obstacle to truth finding,³²³ there is an additional problem: The legal deterrents that might act as an incentive to truth telling—criminal and civil penalties—are not as effective as they might be. Even when a corporation is found to have lied, it may be difficult to attribute that lie (and the requisite intentionality) to any person, thereby making a corporate criminal conviction virtually impossible. For example, the government succeeded in garnering a conviction against Arthur Andersen for its role in the Enron debacle, but that conviction was later overturned by the Supreme Court after the Court found the jury instructions were too vague on the mens rea issue and therefore might have permitted the jury to convict without evidence of the requisite criminal intent.³²⁴

Of course, establishing the mens rea or intent of a corporation is itself a somewhat metaphysical proposition since we can only find intent in its human representatives—the employees, officers, and directors. But the dispersal of authority, knowledge, and responsibility within organizations may mean that everyone connected with an organization can plausibly claim they did not know that what they were doing was wrong, so a criminal conviction, whether of the corporation or of an individual employee, may be difficult to obtain, as it was in the Arthur Andersen case itself.

Moreover, if the interest that justifies protection of commercial expression is the production of truth it appears that for-profit corporations (perhaps like human speakers) are mostly interested in the protection of their own speech, not in freedom of expression for others. Corporate interests often aggressively litigate against the speech of others that they find offensive. Examples of this practice are the “McLibel” case in the U.K. discussed above, beef producers lawsuit against Oprah Winfrey for what it claimed was “disparagement” of

Move+to+Curb+Tobacco+Penalty&st=nyt.

³²³ This is not just a problem in the area of corporate governance or communication with consumers. Corporate funding of scientific research may pose a problem for scientific truth as well. “Entanglement with business interests undoubtedly poses a threat to the scientific ethos, and in consequence to the advancement of science.” Susan Haack, *Scientific Secrecy and “Spin”*: *The Sad Sleazy Saga of the Trials of Remune*, 69 LAW & CONTEMP. PROBS. 47, 63 (2006).

³²⁴ *Arthur Andersen, L.L.P. v. United States*, 544 U.S. 696 (2005).

beef,³²⁵ Monsanto's efforts to suppress negative press about its bovine growth hormone,³²⁶ and Fox Network's lawsuit in the U.S. against comedian Al Franken for the use of the words "fair and balanced."³²⁷ Suits such as these undoubtedly have, and are meant to have, a chilling effect on the target and anyone else who has a mind to criticize the companies in question.³²⁸

Moreover, advertisers often have enormous influence on media content and can withdraw their advertising dollars from media and from messages with which they disagree or which they find presents the wrong environment for their ads.³²⁹ Such influence and pressure affects the availability of dissenting or contrary information because advertisers can affect the willingness of publishers to carry such information. For example, for years many general circulation publications were threatened by the tobacco industry with the withdrawal of advertising if they published news stories on the health dangers of smoking.³³⁰ And unfortunately such threats "are usually unnecessary—the media know what behavior is expected and have complied."³³¹ The result is far less truth any way you look at it.

³²⁵ CNN News, *Oprah Accused of Whipping Up Anti-Beef "Lynch Mob"*, <http://www.cnn.com/US/9801/21/oprah.beef/>, Jan. 21, 1998 (last visited Aug. 13, 2007). For a discussion of veggie-libel laws, see Megan W. Semple, *Veggie Libel Meets Free Speech. A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 404-05 (1996) (describing agricultural disparagement law arising out of the concerns raised about the pesticide Alar).

³²⁶ For a discussion of one instance which got a lot of coverage, see the discussion of Monsanto's attempt to suppress a negative news report on their bovine growth hormone product *infra* note 413.

³²⁷ See *Fox News Network, LLC v. Penguin Group (USA), Inc.*, No. 03 Civ. 6162(RLC), 2003 WL 23281520 (S.D.N.Y. Aug. 20, 2003) (denying temporary restraining order on humorist Al Franken's use of the term "fair and balanced").

³²⁸ In secret tapes made of the settlement negotiations in the McLibel case some unidentified representative of McDonald's appears to concede that the lawsuit was intended to discourage others with similar opinions as Steel and Morris from voicing their opinions publicly. The McLibel litigation follows the pattern of what has been called a SLAPP (strategic lawsuit against public participation) action. For a general description of SLAPP suits and the first amendment issues, see Alice Glover and Marcus Jimison, *S.L.A.P.P. Suits: A First Amendment Issue and Beyond*, 21 N.C. CENT. L.J. 122 (1995).

³²⁹ It hardly seems necessary to support this assertion since it seems so obvious, as illustrated by the famous Janet Jackson "Nipplegate" incident which resulted in loss of sponsorship opportunities to Ms. Jackson as well as tangles over program content. More recently AT & T was accused of censoring a live feed for a Pearl Jam concert to delete critical references to President Bush. Although the company claimed those deletions were an error it apparently admitted that it was censoring the feed for profanity. See Center for Media and Democracy, *Jamming Pearl Jam*, <http://www.prwatch.org/node/6342> (last visited Aug. 15, 2007). Nevertheless, some discussion of this phenomenon can be found in MCCHESENEY, RICH MEDIA, *supra* note 15; C. EDWIN BAKER, ADVERTISING, *supra* note 139; C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2006).

³³⁰ See, e.g., BAKER, ADVERTISING, *supra* note 139, at 52-53 (citing cases where magazines had cancelled articles criticizing or edited out discussions of the adverse effects of tobacco).

³³¹ *Id.* at 53.

When combined with the massive amounts of spending by large, multinational corporations, the prospect looks grim for truth to win in the marketplace of ideas if market principles prevail. Nike spent almost \$1 billion in fiscal year 1997 on marketing,³³² yet Nike argued to the Supreme Court that without constitutional protection from liability for false speech it would be silenced, and it would not be able to participate in the debate about globalization.³³³ A billion dollars funds a lot of speech. It seems demonstrably untrue that Nike was silenced. And given the economic imperatives discussed above, it is unlikely that Nike will be silenced by any penalties or judgments against it for alleged misrepresentations.³³⁴ But with that sort of budget it may well be able to silence or drown out opponents. What this adds up to is the conclusion that it is naïve to think that in this environment more protection for commercial speech, that is, removing the existing constraints on it, is likely to lead to more truth, a better debate, or any more information. Indeed, it is plausible to conclude the opposite will occur—rather less information and more misinformation.

C. *Participation in Democracy*

A third justification offered by Emerson and others for the protection for freedom of expression is that freedom of expression is a prerequisite to democracy. A democracy is not really a democracy without the participation of its citizens. Citizens require protection for their expression in order to fully participate. Corporations, though, are not citizens. They have no interest in democratic participation as such. For-profit corporations have an interest in supporting whatever legal or political regime guarantees the most congenial environment in which to generate profits. Thus, they do not hesitate to re-incorporate in Liberia or the Bahamas or to move certain parts of their operations to other countries whenever it is profitable to do so. The fact of initial incorporation in the United States is not an insurmountable obstacle to this practice, and they have no allegiance to any particular nation.³³⁵ As

³³² See Amended Complaint at 5, *Kasky v. Nike, Inc.*, 539 U.S. 654 (2003) (No. 994446).

³³³ See Brief for the Petitioners, *supra* note 147, at 38-50.

³³⁴ The settlement agreement was largely confidential except for a portion which awarded \$1.5 million to the Fair Labor Association and \$500,000 a year to be donated to a microloan program. For a discussion of the settlement and its implications, see Ronald K. L. Collins & David M. Skover, *The Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story*, 54 CASE W. RES. L. REV. 965, 1019-21 (2004).

³³⁵ I leave aside the question of whether the nation-state or patriotism or any of its accoutrements are good or desirable things. They may not be. And at least one observer has suggested that the concept of a nation-state is in decline and being replaced with market-states. See PHILIP C. BOBBITT, *THE SHIELD OF ACHILLES* (2003). It is easy to understand why the market-state might protect its own expression. But it is equally easy then to see why the public

non-citizens, corporations have (or, rather, ought theoretically to have) no role in the participation in democracy.³³⁶ This is not to say of course that their representatives cannot offer opinions. But it is to say that corporations are not clearly *entitled* to a voice in matters of public concern as a matter of democratic participation. Nevertheless, their opinions and their influence are widespread.

Corporations cannot vote. Yet it is apparent to the meanest intelligence that corporations have a major, if not a dominant, role in our democracy. Corporations play key roles in urging legislation upon Congress with a large measure of success, as the recent revisions to the bankruptcy code, urged by the credit card companies for their own benefit, illustrate.³³⁷ Typically industry has drafted the legislation in question as well as funded the research and engaged in public relations campaigns to get the issue as they see it before key members of the public and the legislatures.³³⁸ In the past, corporations could offer legislators attractive trips to luxurious locales under the pretext of “education.”³³⁹ Still, they can invest billions in not-for-profit organizations to act as fronts, such as alleged in the tobacco litigation with the now defunct Council for Tobacco Research.³⁴⁰ They can also invest billions in putting together “astroturf” organizations to lobby

might want some restraint on that expression just as the First Amendment itself is constructed as a restraint on government.

³³⁶ See, e.g., Baker, *Paternalism*, *supra* note 139, at 1178-83 (Part III—A Corporation is Not A Citizen).

³³⁷ See, e.g., Teresa A. Sullivan, Elizabeth Warren, & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 253-54 (2006) (detailing how industry lobbying efforts on the bill by one account exceed \$100 million dollars without an organization with comparable assets lobbying on behalf of debtors). Congress has currently passed a bill with extensive limits on certain types of lobbying but, based on newspaper accounts it appears to be primarily directed at the practice of wining and dining legislators, not at prohibiting the practice of drawing up proposed legislation. David D. Kirkpatrick, *Tougher Rules Change Game for Lobbyists*, N.Y. TIMES, Aug. 7, 2007.

³³⁸ See *supra* note 336. See also Rafael Efrat, *Attribution Theory Bias and the Perception of Abuse in Consumer Bankruptcy*, 10 GEO. J. ON POVERTY L. & POL’Y 205, 220 (2003) (“The subtle mass media message of consumer bankruptcy abuse has been recently steered, to some extent, by an aggressive public relations campaign by the credit card industry.”). The author claims that this practice and the fairly uncritical adoption by media made the perception of bankruptcy abuse salient and thus look advantage of cognitive biases to create impression unsupported by the data. Elizabeth Warren, *The Market for Data: The Changing Role of Social Sciences in Shaping the Law*, 2002 WIS. L. REV. 1, 22 (2002) (describing credit industry’s role in generating research). Robert Cwiklik, *Ivory Tower Inc.: When Research and Lobbying Mesh*, WALL ST. J., June 9, 1998, at B1.

³³⁹ The recent rule changes make that practice suspect and apparently largely out of bounds. See Kirkpatrick, *supra* note 337. On the issue of corporate lobbying generally, see STAUBER & RAMPTON, *supra* note 131; SHELDON RAMPTON & JOHN STAUBER, *TRUST US WE’RE EXPERTS* (2001); and NELSON, *SULTANS OF SLEAZE*, *supra* note 131.

³⁴⁰ Examples are the various research institutes set up by the tobacco industry to act as fronts for opinions that the harm caused by smoking was an open question.

legislators.³⁴¹

Influence is not limited to the legislature. Corporate interests also may influence agencies, whether indirectly through the efforts of lobbying legislators, the executive, who may in turn shape agency decision making, or directly through comments to the rule-making process or adjudicative processes available under administrative law. And because priorities shift over time and depending on who is the occupant of the White House, sometimes enforcement efforts may not be as vigorous as the drafters of the legislation or rule contemplated. It may not much help for a particular regulatory effort if the head of that effort, be it an agency or a prosecutor, views his or her job as being in partnership with business³⁴² or decides he or she is not in favor of a particular regulatory or disciplinary effort and wants to withdraw it.³⁴³ One particularly stark example of this was in the early 1980s when the head of the Federal Trade Commission publicly described his understanding of his job as one of urging Congress to narrow the scope of the agency's jurisdiction.³⁴⁴ And it certainly is not obvious that narrowing the scope of an agency's jurisdiction might not be in the public interest, as this understanding was in some conflict with the legislative direction that had been given by statute. How much of this understanding sprang from political pressure from the targets of regulation is probably impossible to say. But it is commonplace to suppose that politicians are rather more solicitous of industry interests than those members of the public with less to offer in the way of

³⁴¹ "Astroturf" organization refers to organizations created by paid public relations firms or other corporate sponsors organizations which resemble grassroots organizations put together by citizens but which are really made up of persons paid by the industry in question to pose as "concerned citizens." See STAUBER & RAMPTON, *supra* note 131, at 79 (describing astroturf lobbying efforts).

³⁴² "The notion that business and government are and should be partners is ubiquitous, unremarkable, and repeated like a mantra by leaders in both domains." BAKAN, *supra* note 112, at 108.

³⁴³ There is often something of a revolving door between the firms in the industry to be regulated and the employees of the governmental agencies doing the regulating. Editorial, *Lobbying from Within*, N.Y. TIMES, June 17, 2005, available at <http://www.nytimes.com/2005/06/17/opinion/17fri1.html?scp=1&sq=lobbying+from+within&st=nyt>. There are perfectly understandable reasons supporting this movement that are not in any way sinister. Who is likely to have more knowledge of the practices of the agency than a former employee? Similarly, why would not the agency see an advantage to hiring people with industry knowledge? And how is that knowledge to be acquired outside of the agency? Nevertheless, the degree of movement is often troubling and raises concerns about agency capture.

³⁴⁴ See, e.g., Peter Grier, *FTC Chief Changes Role of "Nation's Nanny,"* CHRISTIAN SCI. MONITOR, Dec. 6, 1983, at 5 (describing chief of FTC as pushing Congress for narrower tailoring of his agency's authority), available at <http://www.csmonitor.com/1983/1206/120635.html>. As recently as 2003 an FTC Commissioner described the agency's mission as allied to that of advertisers. Commissioner Thomas B. Leary, FTC, Speech at a Conference at the Food and Drug Law Institute: Allies in a Common Cause (Jan. 16, 2003), (transcript available at <http://www.ftc.gov/speeches/leary/fdli.pdf>).

campaign contributions. What is true for legislators often seems true of all politicians, and high level appointees in the administrative side are often, in a very real sense, politicians. Thus, when the Department of Justice reduced the requested damages in the above mentioned tobacco lawsuit from the \$130 billion it had originally sought to “only” \$ 10 billion, some observers felt this might be connected to the tobacco lobby’s influence.³⁴⁵ Lawyers for the Justice Department denied that they had reduced the damages demand as a result of political pressure.³⁴⁶ However, many observers were skeptical.

These incidents and others are suggestive of widespread corporate influence on government. Despite having no vote, large corporations have far more voice, more participation in shaping the law and government policy than most flesh-and-blood citizens do.³⁴⁷ “We live in corporate advertising’s democracy.”³⁴⁸ This is especially true where the communications are designed to affect policy. It is difficult to understand how requiring that corporate communications be truthful, where the truth can be ascertained, will injure democracy.

In addition, because corporate speech is not itself the result of a democratic process, it also does not have a claim on that basis to be respected as a contribution to the democratic process. Corporate positions on political or social issues are not produced via a democratic process. There is no shareholder democracy with respect to the issuance of corporate speech since shareholders’ participation in a corporation is extremely circumscribed and largely relegated to issues of the delegation of control.³⁴⁹ So when managers craft corporate speech, they do so with one overriding goal—profit—which may or may not reflect actual shareholder views, had they been asked. Speech that does not enhance shareholder value cannot be justified as an appropriate corporate expenditure.

When a corporation lobbies . . . its goal is set by law and market: it lobbies on behalf of the principle of the fictional shareholder, to maximize the returns to an imaginary being with no interests other

³⁴⁵ See Lichtblau, *supra* note 322.

³⁴⁶ *Id.*

³⁴⁷ This observation constitutes at least a rebuttal to the recent claim by George Mason economist Bryan Caplan that it is irrational voters, unschooled in the verities of economics, who are responsible for bad laws and bad policies because they keep voting for politicians pursuing bad economic policies. BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER* (2007). There is some question whether the voters are actually getting what they are voting for in the first place. See THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?* (2004). But based on the amount of money spent by corporations on lobbying, including drafting legislation, it might seem fair to say that the actual content of the laws owes far more to the more economically sophisticated corporate lawyers, executives, and lobbyists than it does to voters.

³⁴⁸ Bruce Ledewitz, *Corporate Advertising’s Democracy*, 12 B.U. PUB. INT. L.J. 389, 459 (2003).

³⁴⁹ See *supra* note 185 and accompanying text.

than its shares in the corporation. No internal debate, coalition building or political process sets the corporate goal; the views of the various human participants in the firm are largely irrelevant. Unlike the group of citizens, then, the corporation speaks in a unified voice on behalf of a single principle rather than an ever-recreated compromise.³⁵⁰

....

Fictional shareholders... will sacrifice almost anything in the interest of higher profit...; in contrast, the citizens behind the fiction can be expected to have far more diverse and conflicted opinions on... important political struggles.³⁵¹

Not only is the corporation itself a legal fiction, not a human being with interests in expression, its constituents are themselves a fictional product. The fictional shareholder is a device management uses as the measure of shareholder interest. And pursuant to that fiction the shareholders' interests are relentlessly economic and short-term at that.³⁵² This makes them inappropriate subjects of protection since it makes their interests interchangeable with capital, even though capital is already influential. It does not need protection.³⁵³

The Supreme Court has itself occasionally acknowledged that a for-profit corporation's participation in the democratic process is appropriately circumscribed. Although the Supreme Court in *First National Bank of Boston v. Bellotti*³⁵⁴ held that a corporation had a right to participate in political debates in some fashion, it retreated some from this position in *Austin v. Michigan Chamber of Commerce*³⁵⁵ with a reminder that corporations are, after all, creatures of the state and recipients of special benefits from the state not enjoyed by natural persons.

State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but

³⁵⁰ Greenwood, *supra* note 109, at 1054.

³⁵¹ *Id.* at 1004.

³⁵² Because a very large portion of stock is held in trust for the investor in the form of retirement and other funds that pool resources and the managers of those funds have a fiduciary relationship, the beneficial owners feel even more pressure to focus solely on short term profitability because there is little in the way of legal or moral justification for managers to do anything else. Leo E. Strine, Jr., *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behavior* 31 (Univ. of Pa. Working Paper Series, 2007), available at <http://lsr.nellco.org/upenn/wps/papers/187>.

³⁵³ Greenwood, *supra* note 109, at 1003.

³⁵⁴ 435 U.S. 765 (1978).

³⁵⁵ 494 U.S. 652 (1990).

also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace.³⁵⁶

As the Court in *Austin* also noted,

[T]he political advantage of corporations is unfair because “[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.”³⁵⁷

Moreover, many observers have suggested that the techniques of advertising and promotion are corrosive of democracy to the extent that these techniques have bled into political communication.³⁵⁸ Frank Luntz, master political strategist, describes his techniques as relevant to both business and politics and consults for both.³⁵⁹ The interpenetration of the strategies, ethics, and techniques of marketing which do not seek primarily to inform but to persuade into political speech may explain why President Bush’s spokesperson, Andrew Card, compared the announcement regarding the War in Iraq to a “product launch.”³⁶⁰ It may also explain the incidents of paying pundits to promote government programs or to carry government messages, a public relations technique that in the hands of the government appears to be prohibited propaganda.³⁶¹ It may explain why politics looks and sounds so much like marketing or why the current administration appears to think, like the quoted marketing executive, “truth is irrelevant” as to whether or not weapons of mass destruction are found or there has really been a terrorist plot that was foiled by the authorities, or whether anyone remembers who told what to whom about CIA agent Valerie Plame.

³⁵⁶ *Id.* at 658-59 (internal quotations and citations omitted).

³⁵⁷ *Id.* at 659 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986)). The Court recently showed signs of stepping back again in the other direction in support of fewer restrictions in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007). But because the entity in question was a not-for-profit, clearly political organization it is not clear how much we should assume this will tell us about the Court’s willingness to not make any distinctions at all between the for-profit and the not for-profit organizations in the political context.

³⁵⁸ See, e.g., *PBS Frontline: The Persuaders* (PBS Home Video 2004) (featuring an interview with Bob Garfield, columnist for *Ad Age*, an advertising trade publication, describing his views of the negative effects of what he deems blatantly false political ads, whose content is influenced by advertising trends); Ledewitz, *supra* note 348 (describing commercial advertising and extensive protection for same under the commercial speech doctrine as a threat to democracy because advertising is not itself democratic and need not consider democratic imperatives).

³⁵⁹ “Language, politics, and commerce have always been intertwined, both for better and for worse.” LUNTZ, *supra* note 307, at xii. See also *id.* at 127-78 (corporate and political case studies).

³⁶⁰ See *supra* note 124.

³⁶¹ See Lee, *supra* note 42, at 984 n.5 and accompanying text.

These are simply problems of spin control, not reasons to fear troubling backlash from the electorate.³⁶²

It is undoubtedly the case that politicians have always been in the persuasion business. And politicians, like lawyers, do not enjoy the highest reputations for honesty in the popular imagination. That does not mean that there is not something vaguely troubling about the unselfconscious adoption of marketing techniques, attitudes, and terminology to issues that seem of rather weightier significance than fresher breath. When we consider for-profit corporations' very powerful interests and their influence in government, their anti-democratic structure, and their singular organizational imperatives, it hardly seems that democracy would be well served by offering them even more leeway in the form of a constitutional shield for their expressive activities. Protection for either democracy or the democratic process seems to offer little support for the proposition that for-profit corporations should enjoy the same rights to speech as human beings. To the contrary, an examination of the reality of the accumulation of resources, access to media, and corporate influence on government suggests that it is properly restrained in support of the goal of the preservation of democracy.

D. *Balance and Blowing Off Steam*

Finally, Emerson suggested that protection for freedom of expression offered some play in the joints of democracy—some possibility for blowing off steam by those who might otherwise have incentives to foment unrest and that such protection thereby contributed to social stability.³⁶³ But those persons he envisioned needing a place to vent were undoubtedly the poor and dispossessed, those whom the people in power must always fear lest they get excessively disgruntled. For-profit corporations, while they may, as novelist Max Barry imagined in *Jennifer Government*, pose a real threat to government, do not pose that threat because they do not have outlets for their expression.

As non-human entities, corporations do not have, in the first place, an emotional need to blow off steam. And given their privileged position in the American economy and in the political realm, it is difficult to characterize corporations as a despised and powerless

³⁶² FRANK RICH, *THE GREATEST STORY EVER SOLD: THE DECLINE AND FALL OF TRUTH FROM 9/11 TO KATRINA* (2006) (exhaustive review of the Bush administration's P.R. techniques).

³⁶³ Others have advanced similar theories as well. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 80-85 (1984) (arguing that the marketplace of ideas is a legitimizing myth that defuses disenchantment with status quo and governing elites).

minority having a grudge they need to vent lest they upset the government.³⁶⁴ Despite corporations' privileged position, the request for more protection is framed as one to protect balance. But the environment in which discussion about many issues of public concern take place is already severely imbalanced and compromised by the firm grip of consumerism and corporate structuring of our wants and needs—in the first world and elsewhere. Only the truly poor are largely free of the bombardment of commercial speech experienced by almost everyone else since, because they do not have much money, poor people do not present a good market.³⁶⁵ Nevertheless even those not marketed to may suffer some of the social consequences of consumerism, albeit without any sponsor to voice their concerns more directly to government. Interest in balance hardly seems to support the argument for more protection for corporate speech.

Even putting aside economic imbalance, there is evidence that on the merits, interest in balance would seem to go in the other direction because it is pro-corporate speech that appears neutral. It is the anti-corporate argument that has difficulty getting aired because of for-profit corporations' dominance of the media.³⁶⁶ For example, in *Sultans of Sleaze*, author Joyce Nelson describes the efforts in 1988 of the British Columbia Council of Forest Industries to re-position their industries as "green."

The council mounted a massive and expensive campaign to convince the public of its 'sound forest and stewardship and reforestation programs.' The campaign included educational displays in shopping malls, huge posters at bus stops, ads inside buses, and colour [sic] supplements delivered to most households in the province. . . . But the biggest irritant in the whole PR effort was the Council's 'Forests Forever' ads: a \$2 million pitch on billboards and TV and in print media in which the council spokespeople say what a wonderful job

³⁶⁴ Although, because they have so much power, the danger may be the temptation to effectively run the government for its own benefit. This is the dystopian possibility satirized in the novel *Jennifer Government*. See *supra* note 1.

³⁶⁵ Poor people may find themselves disproportionately the target of advertising of products like tobacco, alcohol and lottery tickets. And one recent contributor to *Advertising Age* urges marketers to realize that even people earning only \$2,000 a year can represent an untapped market that will be responsive to the right approach. Michelle Kristula-Green, *How to Market to Asia's Masses*, ADVERTISING AGE, Aug. 6, 2007, available at http://adage.com/print?article_id=119637 (last accessed Aug. 6, 2007). Given however that the author was touting marketers' success in converting many Vietnamese from riding bicycles to riding motorcycles and scooters (a somewhat troubling shift in light of the problem of global climate change, although someone driving a car in North America is not in the best position to point fingers) and the successful promotion of powdered milk (a product of dubious utility if there is no reliable source of clean water), it is not clear that these efforts represent an overall net gain to either the consumers or the society at large.

³⁶⁶ See, e.g., ERIC ALTERMAN, WHAT LIBERAL MEDIA? (2003).

they are doing in managing B.C. forests.³⁶⁷

The ads ran for over a year on CBC-TV despite protests by environmental groups; but when a counter-ad, "Mystical Forests," detailing the actual practices of the logging industry was proposed by environmentalists and presented for CBC approval, it was turned down as "too controversial."³⁶⁸

Canadian journalist and social activist Kalle Lasn has encountered similar problems getting the broadcast media to air his organization, AdBusters' advertisements for "Buy Nothing Day" or for its advertising parodies, leading the AdBusters Media Foundation to initiate legal action that has (so far) apparently been unsuccessful.³⁶⁹

Reflecting similar tendencies to reject controversy, Amtrak, a governmental corporation, attempted to refuse to carry artist Michael Ledron's advertisement which entailed a photo-commentary on Coors Brewing Company's support for the Nicaraguan Contras and other right-wing causes. The advertisement parodied Coors' advertising campaign which proclaimed Coors to be "the Right Beer now," with the line, "Is it the Right's Beer Now?" Despite Ledron's payment for the advertisement, Amtrak refused it on the grounds that Amtrak did not allow "political" advertising.³⁷⁰ Of course, the characterization of Ledron's advertisement as "political" implies that the Coors advertisement is not political.³⁷¹ And in a sense it is not. Coors just wants to sell beer. But Ledron wanted to impeach the political choices the company had made by supporting the Contras. So he sued claiming the First Amendment prohibited Amtrak from refusing his advertisement. Amtrak attempted to assert its status as a corporation to argue that Lebron could not claim a violation of his First Amendment rights in connection with its refusal of what it characterized as political speech because there was no government action.³⁷²

The Supreme Court rejected Amtrak's argument, holding that where the government retains complete control over the corporation, the corporate form may be disregarded and the corporation viewed as an arm of the government. Nevertheless, this resolution of the case turns on Amtrak's status as a *governmental* corporation. A private media

³⁶⁷ NELSON, *supra* note 131, at 133.

³⁶⁸ *Id.*

³⁶⁹ See KALLE LASN, *CULTURE JAM: THE UNCOOLING OF AMERICA* 196-97 (1999).

³⁷⁰ *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 376-77 (1995). The adoption of the Coors company slogan to more effectively convey the message is an example of the "culture jamming" described by Lasn. See *supra* note 369.

³⁷¹ I agree that the Coors advertisement is *not* "political" in the same way that Ledron's speech was. But the characterization of Ledron's speech as having a "position" while the Coors advertisement does not suggests that the Coors advertisement is neutral. This conforms to the traditional distinction between commercial and political speech.

³⁷² *Lebron*, 513 U.S. at 377-78.

company would (in general) be free to reject any advertisement it found controversial or political without fear of a First Amendment claim. And since one of the things of greatest concern for advertisers, the lifeblood of all media, is that all content in the media present the appropriate selling environment for their goods and services, it is easy to see why "[a] message in support of the status quo is typically considered to be 'neutral,' 'objective,' and 'non-controversial,' while a message that departs from the status quo position or criticizes it is considered to have a 'point of view' and 'bias.'"³⁷³

Such an orientation does not suggest that balance is likely to emerge from the current environment.³⁷⁴ The corporate form offers an unparalleled opportunity for the accumulation of wealth and power, while, at the same time, diffusing responsibility. Although the frustration expressed on behalf of many business interests about over-regulation and other perceived impediments to business may suggest that this frustration could become a threat to the government and that protection for commercial speech that insulated corporations from liability might lessen this threat in part, it hardly seems like the sort of safety valve that Emerson seemed to have had in mind in discussing this rationale.

In short, after reviewing all of Emerson's proposed grounds for protecting freedom of expression: autonomy and self-expression or self-actualization; discovery of the truth, preservation of democracy, or the democratic process; and ensuring a measure of social stability by offering some protection for dissent, none of these grounds offers support for protection of commercial speech. Instead they offer some powerful reasons for retaining some restrictions.

IV. DEALING WITH THE PERSISTENT OBJECTIONS

Perhaps it is because of the power of the metaphor of corporate personhood on commercial speech discourse,³⁷⁵ but a persistent

³⁷³ NELSON, *supra* note 131, at 133.

³⁷⁴ Another example of this phenomenon of defining for-profit commercial speech as normatively neutral in contrast to non-commercial interests is the characterization in the now defunct publication, *Brill's Content*, of Consumer's Union having a compromised "neutrality" because it "accepted grant money from foundations with specific agendas—such as limiting the use of pesticides" and then ran "stories supporting those foundations' goals." Jennifer Greenstein, *Testing Consumer Reports*, BRILL'S CONTENT, Sept. 1999, at 72.

³⁷⁵ As Professor Mark Hager put it, "Social and legal struggles will continue to be iconic, that is, metaphorical, struggles Antiprogressive conceptions must be fought with competing conceptions. . . . Conceptual struggle will persist, even though it be recognized that these are contests of metaphor and symbol, not of logic, and are won through eloquence and imagery, not through showdowns in pure reason." Mark M. Hager, *Bodies Politic: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 577 (1989). See also Steven L.

objection raised to the argument advanced in this article, the idea that for-profit corporations are legitimately subjected to different standards than human beings or not-for-profit organizations, is that it involves speaker discrimination—a sort of discrimination that some observers have suggested is particularly inappropriate for government to engage in. Even where critics concede that speaker discrimination is not per se inappropriate, it may be argued that such discrimination is harmful because of the difficulty in drawing lines between for-profit and not-for-profit organizations or between corporations and other forms of business organization. Since, the argument goes, that distinction is impossible to make we ought to strap ourselves to the mast and keep the government out of the business of making speaker discrimination a basis for speech regulation.

As to the first objection, there is nothing inherently inappropriate under existing doctrine about differing standards depending upon the identity of the speaker. For example, differing standards have been upheld with respect to attorneys³⁷⁶ rather than other commercial speakers or the public at large. Moreover, I frequently encounter the objection that my argument would appear to deprive not-for-profit groups, organized as corporations, of speech rights. “What about the NAACP, the NRA?,” they say. Furthermore, even if we grant a for-profit/not-for-profit distinction, what prevents corporations such as Wal-Mart or Phillip Morris from setting up not-for-profit corporations to do their speaking for them? The answer to the first question, distinguishing between the for-profit and the not-for-profit corporation, is addressed at more length below. The answer to the second question, corporate funded not-for-profits, is more difficult. It is not impossible to draw distinctions, and the Supreme Court has done so. But effective policing might require fundamental reorganization of the principles of law governing corporations.

Opponents of regulating corporate speech also claim that discriminating on the basis of marketing versus non-marketing content

Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1164 (1989) (“They [the courts] will not be able to purge metaphors from their analyses, but will be driven to other metaphors.”); Berger, *supra* note 183; Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Reform*, 58 MERCER L. REV. 949 (2007).

³⁷⁶ Fla. Bar v. Went for It, Inc. 515 U.S. 618, 635 (1995) (stating, “We believe that the Florida Bar’s 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered.”); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 459 (1978) (“A lawyer’s procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State’s proper sphere of economic and professional regulation.”).

is inappropriate content regulation.³⁷⁷ This objection overlooks that content discrimination by category—pornography, fighting words and fraud—are already established areas of content regulation. Indeed, to the extent that the commercial speech doctrine sets up commercial speech as subject to a different analysis than political speech, it does represent regulation on the basis of content.

Finally, proponents of balance point to available critiques in the media of corporations like Nike as evidence that disingenuous or misleading public relations efforts will ultimately fail because the truth will come out, and, thus, concerns about overbreadth and governmental overreaching should cause us to prefer overprotection of all speech, including commercial speech, rather than overregulation, which risks chilling some valuable speech. These are objections which raise good questions but ultimately are not persuasive.³⁷⁸

A. *Speaker Discrimination and Line-Drawing*

In the first place, the corporate entity is a legal creation, so one response to the speaker discrimination objection is that discrimination is not unjustified if it is well-founded in fact. This is not like the invidious discrimination on the basis of race, gender, or sexual orientation that would offend human dignity and principles of equality. Corporations are not human beings. They only have the qualities and the rights given to them by law, no more, no less. And just as the law already distinguishes between for-profit and not-for-profit, close and public corporations, with differing rules applicable depending upon the status of the corporation, it is not immediately obvious why, if a not-for-profit is subject to different tax laws, it could not be subject to different treatment for purposes of the First Amendment.³⁷⁹ Indeed, such differing treatment is already the law with respect to the political speech of organizations and legal distinctions between the treatment of for-profit and not-for-profit entities.

In *First National Bank v. Bellotti*, the Supreme Court suggested that the speaker's identity as a corporation had no bearing on the value

³⁷⁷ As Robert Post has pointed out, "content-based regulation of speech is routinely enforced without special constitutional scrutiny." Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2364 (2000).

³⁷⁸ It is worth noting that in both the *Austin* case and the MCFL case the Court was confronted with not-for-profits. So the issue of distinguishing between types of corporate organizations and organizations and individuals is one with which the Court already has grappled. See *infra* notes 381-389 and accompanying text.

³⁷⁹ In fact it is currently the case that not-for-profits organized as corporations may be prohibited from some lobbying activities that are otherwise protected. This is exactly backwards.

of its speech.³⁸⁰ Later, however, the Court retreated from this very strong stance that line drawing on the basis of speaker identity was always inappropriate. In *FEC v. Massachusetts Citizens for Life*,³⁸¹ the Court was faced with the question of whether a federal election funding statute that required corporations to make contributions only from special segregated accounts was applicable to a not-for-profit organization. While the plurality decision found the statutory limitations on for-profit corporations generally defensible on the grounds the law's purpose to prevent "the unfair deployment of wealth for political purposes,"³⁸² was not implicated in by the not-for-profit organization because "the concerns underlying the regulation of corporate political activity [were] simply absent with regard to MCFL."³⁸³

The distinction between speakers was drawn even more finely in *Austin v. Michigan Chamber of Commerce*.³⁸⁴ There the Court reviewed the constitutionality of a state statute regulating corporate expenditures from general treasury funds in support of or opposition to a candidate. The organization challenging the law was not-for-profit, but, unlike MCFL, it was one organized principally for the purposes of advocacy. The Court found that despite the Chamber's not-for-profit status, Michigan could apply the challenged law to the Chamber because, on the facts, its organization and purpose was broader than that in MCFL and it encompassed several purposes which were "not inherently political."³⁸⁵ The Court observed that, in contrast to MCFL which had a policy of not accepting contributions from business corporations, more than three-quarters of the Chamber's revenues came from for-profit entities and that were it not to apply Michigan's law to the Chamber, "[b]usiness corporations . . . could circumvent the Act's restriction by funneling money through the Chamber's general treasury."³⁸⁶

What emerged from these two cases was a three-part test for distinguishing between entities for purposes of limitations directed at for-profit entities:

Whether the organization was "formed for the express purpose of promoting political ideas, and cannot engage in business activities."³⁸⁷ (Presumably this stands in contrast to the for-profit corporation organized, pursuant to state law to engage in a lawful

³⁸⁰ First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

³⁸¹ Fed. Election Comm'n v. Mass. Citizens for Life (*MCFL*), 479 U.S. 238 (1986).

³⁸² *Id.* at 259.

³⁸³ *Id.* at 263.

³⁸⁴ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

³⁸⁵ *Id.* at 662.

³⁸⁶ *Id.* at 664.

³⁸⁷ *Id.* at 662 (quoting *MCFL*, 479 U.S. at 264).

business.)

The absence of shareholders or other persons with “a claim on its earnings or assets” such that there will be “no economic disincentive for disassociating with it if they [shareholders or members] disagree with its political activity.”³⁸⁸

The independence of the organization from business interests. (This prong invites scrutiny of the organization’s source of funds to prevent as noted above, circumvention of the law by simply channeling contributions to captured nonprofits.)³⁸⁹

If this sort of line drawing is permitted in the context of limitations on corporate political speech,³⁹⁰ it is surely not nonsensical or indefensible in the area of commercial speech generally. Because of differing legal structures, there are very real differences in the incentive structures of for-profit and not-for-profit that make differing treatment as to status sensible in the commercial speech context. Indeed, with respect to not-for-profit corporations you might say that unless the organization is funded by commercial interests, there could be a presumption (perhaps rebuttable) that its speech is not “commercial.” The reverse seems appropriate of for-profit corporations.

As discussed above, the way in which corporations operate offers a basis for distinguishing between them and human beings.

Compared to noncorporate businesses, the corporate structure creates two problems for this supplemental means [social and moral sanctions] of regulating conduct: (1) Shareholders are insulated from the exposure and knowledge that creates social and moral sanctions, and (2) shareholders have collective action problems that make it difficult for them to act on any social or moral impulses they do feel. Managerial conduct that perfectly represented shareholders would thus tend to produce socially suboptimal conduct.³⁹¹

If one were to judge by the tidal wave of socially suboptimal conduct that has lately become apparent, one might be justified in concluding that, in general, management has been representing the fictional shareholder too well.

The coverage of corporations under the First Amendment is a matter of finding a theoretical fit between the purpose of the amendment and the nature of corporations. But corporations have no organic nature.³⁹² They have the form they are given and thus whether their

³⁸⁸ *Id.* at 663 (citing *MCFL*, 479 U.S. at 264).

³⁸⁹ *Id.* at 663-64 (citing *MCFL*, 479 at 264).

³⁹⁰ For a much more comprehensive discussion of the existing restrictions on corporations’ contribution to political discourse, see Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 7-27 (2001).

³⁹¹ Elhauge, *supra* note 115, at 740 (emphasis added).

³⁹² It may be that groups, including corporations, exhibit phenomena that suggest some

nature fits the purpose depends on their legal construction. Seen in that light, rather than as organic creatures with some mysterious natural essence, distinguishing between for-profit and not-for-profit corporations does not seem as problematic. Corporate law governs the purposes for which corporations are formed—for-profit or not-for-profit—which in turn dictates the applicable legal structure that describes a permissible range of actions in furtherance of those purposes. That seems a natural place to draw the line for speech protection. Treating all corporations as equal persons because all human beings are equal persons seems to reify the corporate person. “[R]eification is a device for making something that is in fact complex seem simple, and that can be dangerous. In reality, only individuals enjoy benefits, or bear the burdens and responsibilities, of actions affecting other individuals.”³⁹³ While it is obviously oversimplified to add to that quotation that “only individuals have opinions or speech rights,” given that not-for-profit organizations are often organized precisely for generating speech, the conclusion that all organizations should have speech rights also does not follow.

The Framers noted the potential for large, for-profit, organizations to accumulate the type of power that can threaten the stability of democracy.³⁹⁴ In the late nineteenth century the growth of massive trust arrangements that exercised enormous market power with detrimental social effects resulted in governmental action trust-busting devices such as the Sherman Antitrust Act.³⁹⁵ Thus, “[i]t is . . . sensible for a Constitution which defends individual free expression and associational freedom to recognize free expression rights for many organizational entities but not for corporate capital.”³⁹⁶ For example,

[in] a union vote, persons are equal. In a corporate vote, shares of capital are equal, but persons are unequal according to how much capital they respectively own. The corporate voice then, represents not a plurality and a unity of people or citizens, but a plurality and unity of capital.³⁹⁷

But this argument does not avoid the practical objection that

organic elements or systematic characteristics. See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971). However, saying groups have some dynamics that we might analogize to an organic character is a far cry from saying they have the same *dignitary* rights accorded human beings.

³⁹³ KLEIN & COFFEE, *supra* note 132, at 118.

³⁹⁴ See, for example, Jefferson’s reference to “the aristocracy of monied corporations” as a “challenge to our government” quoted in NACE, *supra* note 133, at 46.

³⁹⁵ For a description of the rise and fall of the trusts and what he calls the “robbers and the barons,” see Steven Harmon Wilson, Ph.D., *Malefactors of Great Wealth: A Short History of “Aggressive” Accounting*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS, *supra* note 27, at 41-61.

³⁹⁶ Hager, *supra* note 375, at 653.

³⁹⁷ *Id.*

definitional borders are nevertheless permeable. And when it is difficult to sort out news from promotion or art from product placement, not every case may be so easy to resolve. Some groups may represent real mixed-purpose entities even more difficult to pigeonhole than the Chamber of Commerce.³⁹⁸ Corporations fund real grass roots and not-for-profit organizations as well as astroturf organizations and front operations. How are we to tell the difference? And who should be trusted to make the distinctions? If the local mom and pop grocery store wants to protest government zoning regulations and add the prominence and power of its trade name in lieu of the perhaps less well known names of the individual owners, should that be permissible? Does the argument to deny for-profit corporations the protection of the First Amendment start us down a slippery slope in which some valuable speech will be regulated away?

This is a problem Professor Shiffrin describes as the bias problem. And it is real. Moreover, it is often difficult to recognize bias when it exists.³⁹⁹ The bias problem is not, however, an insurmountable problem because in fact the bias problem is one which we regularly encounter in the law. The objection about speaker discrimination is one that goes to the heart of our more cherished illusions about the potential of law for establishing certainty. The objection seems so persuasive when offered in the context of this question of protection for speech. Yet when one looks more closely, it is clear that almost all of the law is made up of such difficult line-drawing exercises.⁴⁰⁰ And the argument that we must protect the for-profit corporation's speech because we cannot tell where to draw the line as between for-profit and not-for-profit and mixed-purpose groups is an objection that does not withstand close scrutiny—as reflected in the cases discussed above as well as many others. The law already makes many distinctions between for-profit and not-for-profit, between types of business (such regulated monopolies), and between businesses on the basis of size, location, and revenues. For example, certain aspects of Sarbanes-Oxley are only applicable to companies above a certain size. In September of 2005, the Securities and Exchange Commission extended a second extension of time for small business to comply with certain of the provisions of Sarbanes Oxley.⁴⁰¹ "Small" is defined as companies with "a market capitalization

³⁹⁸ This is a problem which I discuss in greater detail in Tamara R. Piety, "Flogging," "Fronting," and Fakery: Corporate Public Relations Advocacy Research Groups and Commercial Speech, (Feb. 16, 2007) (draft manuscript, on file with author).

³⁹⁹ Shiffrin, *supra* note 17, at 1272-73.

⁴⁰⁰ For example, how is one to tell legitimate discipline of an employee from retaliatory discipline for the employee's whistle blowing activities? Does the right to bear arms mean the right to bear nuclear arms? What standard of care is reasonable?

⁴⁰¹ Carrie Johnson, *Small Firms Get More Time on Sarbanes-Oxley Rules*, WASHINGTONPOST.COM, Sept. 22, 2005, <http://www.washingtonpost.com/wp->

of less than \$75 million.”⁴⁰²

As with all line drawing exercises, the question could be raised, “Why \$75 million and not \$65 million or \$100 million?” Drawing a bright line always runs the risk of over- and under-inclusiveness such that some of the cases included in the scope of the rule’s application do not actually raise the risk of the evils that the rule is meant to address and that some of the cases meant to be controlled by the rule fall outside of its operation. That is not however a reason not to draw a line. It does not seem at all absurd to suggest that there may be material and significant differences between for-profit and not-for-profit, between the corner grocery store and Time Warner, differences that matter for purposes of the First Amendment.

So the issue, properly understood, is whether there is more harm to be anticipated by drawing the line as I propose, to exclude for-profit corporations, or at least large, for-profit corporations, from obtaining any more speech rights than those announced in the Virginia Pharmacy case—that is, protection for truthful, non-misleading statements—than might flow from lifting the ability of the government to regulate speech in aid of commerce. A parallel inquiry might be whether the benefits anticipated from the regulation of speech exceed the costs or whether, conversely, the benefits of freedom of commercial expression outweigh any costs. Given the harms reviewed here, despite the lack of full protection for commercial speech, it would seem that the dangers of *more* protection are obvious while the potential benefits of more protection may be more dubious.

Certainly, it would seem to be the case that those opposing regulation in the public interest have the obligation to show that there is a less restrictive alternative that does not entail resignation to a categorical prohibition on regulation. This is especially true when we have historically recognized the value of reasonable regulation in the interest of not just of protecting the market, but of protecting the speech rights of the real as against the fictitious.

To be sure, just as when the Court in *New York Times v. Sullivan* drew a line of actual malice for sustaining libel claims against public officials on matters of public concern, it was possible that some meritorious claims would be lost, some libels would go unpunished and perhaps some new, unanticipated evil would arise as a result which might require a reassessment of the standard in light of that evil, [although so far it has not], this proposal, to reject the notion of freedom for commercial expression, may run into future difficulties. But to refuse to act on the basis of a speculative harm or a speculative

difficulty as to how to draw the line in some future cases not yet brought seems wrong when the dangers and problems arising from the current system are so manifest and more protection seems likely to exacerbate rather than alleviate those harms. It cannot be overemphasized that what is at issue here is whether to hand over a constitutional shield to commercial interests for speech contrary to the public interest.⁴⁰³ Do we really want GlaxoSmithKline to have a First Amendment defense to its efforts to market Paxil for off-label uses?

B. *Content Discrimination*

Some observers argue that offering promotional speech less First Amendment protection than political or expressive speech is inappropriate content discrimination. Given that by its terms the commercial speech doctrine sets up a content distinction, this objection is really an argument that the Court in *Virginia Pharmacy* should have recognized the speech at issue as completely protected, rather than setting up an intermediate status for commercial speech.

But couching this objection in terms of content discrimination elides the fact that prior to *Virginia Pharmacy* (and indeed to a large extent afterwards) this was acceptable content discrimination. Promotional (or commercial) speech was simply not thought to be covered by the First Amendment at all. That the doctrine recognized different types of speech necessarily meant that some content discrimination would be built into the logical structure of First Amendment analysis. It was only the marginal expansion of protection in satisfaction of a public purpose that opened the door to claims that the courts or legislatures could not continue to reconsider the issue as one not dictated by the most expansive understanding of first amendment norms, but by the narrowest.

So if commercial communication is not covered, it seems difficult to say that extending limited protection is engaging in content discrimination. By its terms, the Amendment acts as a restraint on government. Even within the framework of the restraint on government, exceptions were made for certain types of speech: libel, obscenity, sedition, treason, etc. *Virginia Pharmacy* had the effect of extending limited First Amendment protection to a previously uncovered content category—commercial speech.

Therefore we must undertake the question of the permissibility of content discrimination from the standpoint that the existing law permits

⁴⁰³ See Daniel J. H. Greenwood, *Markets & Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41 (2005).

content discrimination in this area. Commercial speech is defined by its content.⁴⁰⁴ Thus, the question is not whether we shall *initiate* content discrimination, but whether content discrimination of *this type* is rational and should be extended, modified, or abolished. The *Virginia Pharmacy* Court began from the premise that commercial speech is less critical to the values the First Amendment was intended to protect than other types of speech that were protected. But it concluded that this did not mean that commercial speech was of no value. Even though, as was noted in other contexts, the Constitution does not require subscription to any particular economic theory, the Court found there was some social benefit to be derived from not unduly restricting speech in the commercial context. The Court found some value, coupled with a keen public interest, in certain types of commercial speech—*truthful* commercial speech.

This holding distinguishes commercial speech from core expressive speech which is protected not because of its content or who the speaker is but because protection for it furthers human freedom. And commercial speech by corporations offered to further their interests in the marketplace is very different from that of an organization of persons, such as the ACLU, formed for the purpose of political participation. Just as is so often recited in other contexts, false speech has never been protected for its own sake, the question is whether there is some countervailing reason to protect the false speech? In the political context, as the Court in *New York Times v. Sullivan* noted, protection for even false statements in politics allows for vigorous debate, the airing of all views, etc. It furthers individuals' self-expression and protects the expression of dissident viewpoints.

But what value does false *commercial* speech protect? False commercial speech may give the speaker a commercial advantage, but that is not a socially desirable one. This is one reason fraud has never been protected. To attempt to shield what would otherwise be a fraudulent statement by dressing it up as protected expressive speech is really an attempt to conflate categories of speech in order to deflect legitimate regulation.

Freedom for commercial expression should not be expanded beyond the current doctrine, and the current doctrine ought to be interpreted more capaciously to include all for-profit motivated, promotional speech that takes place under the umbrella of marketing. Let it be left to the facts of the particular case whether some speech is

⁴⁰⁴ There is some dispute about this. But to the extent that commercial speech is only protected under the doctrine if it is true, it seems that whatever else commercial speech is, the test as it stands is content-based to the extent it must be truthful. Compare Weinstein, *supra* note 269, with Bruce E. H. Johnson & Jeffrey L. Fisher, *Why Format, Not Content, is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243 (2004).

primarily marketing. Presumably, in the process of hearing such cases, facts heretofore not considered can be analyzed with an eye to whether or not they fit primarily in the marketing category or primarily in the political speech category, and the outlines of the doctrine can be further sketched out. This is the way a common law system works.

As Justice Holmes observed in *Hudson Water Co. v. McCarter*:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which becomes strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side.⁴⁰⁵

According to Professor Gerald Torres:

What Holmes was describing is the way in which policy is created both logically and prudentially. He was articulating a system for recognizing when a particular position is of doubtful authority. By referring to a system of rights (and within it a system for their evolution), he was rejecting a sterile search for first principles, because he was conscious of the fact that so-called first principles are never unmediated. The way in which they are mediated (the way in which we recognize their legitimate evolution) is by constantly comparing the principle in question with the "neighboring" principles that are not in question in this case, but which describe the boundaries of the issue under consideration. Too great a deviation from the norms described by the family of principles suggests the potential illegitimacy of the deviation. Importantly, it does not foreclose that "deviation" for all time, necessarily, but cabins it when the deviation would render a system of principled restraint unstable. This approach to the problems of the extent of governmental regulatory power reveals the constellation of rights, powers, liabilities, and immunities as a dynamic system, not as the mere ordinal ranking of predetermined claims. That such a dynamic approach to analysis and adjudication leaves much undecided is not a demerit and, in fact, is an important value.⁴⁰⁶

Professor Steve Shiffrin makes a similar claim when he argues for an eclectic balancing with respect to First Amendment questions implicating economic regulation.⁴⁰⁷ Rather than adhering to a particular value, "the Court has been generous about the range of values relevant

⁴⁰⁵ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

⁴⁰⁶ Gerald Torres, *Taking and Giving: Public Power, Public Value, and Private Right*, 26 ENVTL. L. 1, 24 (1996).

⁴⁰⁷ Shiffrin, *supra* note 17, at 1251-82.

in first amendment theory, and unreceptive to those who seek to confine it to a particular favorite.”⁴⁰⁸ Moreover, the “Court has been [properly in Shiffrin’s view] eclectic about the tests it employs in differing contexts.”⁴⁰⁹ “[T]he structure of first amendment doctrine varies from context to context,” Shiffrin observes. And that is a good thing because, [t]he nature of social reality is too complex to expect that any single vision, value, or technique could meet the needs of society.”⁴¹⁰

C. *Balance, Overbreadth, and the Media as Watchdogs*

Some argue that my proposed definition of commercial speech subject to regulation is overbroad and will prohibit or burden speech that should be protected. Given this concern, the argument goes, it is better to allow the speech and rely on the media to uncover deceptive practices and to call to account firms that attempt to deceive the market.

According to these observers the *Nike* case itself is an example of the wisdom of this approach because (according to some observers) few consumers credited Nike’s claims of better labor practices and it continued to get negative coverage in the press despite its public relations campaign.⁴¹¹ There are several reasons why this argument is unpersuasive. First, there are structural reasons to believe that reliance on the media to correct and publicize misstatements is misplaced—the principal structural concern being that of the dependence of much of the traditional media on advertising revenue makes it vulnerable to pressure regarding editorial content from those advertisers.⁴¹² Second, there is abundant evidence to support the proposition that those structural incentives operate to keep much negative information out of the mainstream media, suggesting that cases such as Nike’s, where a large corporation is subjected to some testing of their claims as well as trenchant criticism, are more the exception than the rule.⁴¹³

⁴⁰⁸ *Id.* at 1252.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ This is no longer true. Now Nike regularly appears on some “best corporations” lists. Whether this is a result of substantive changes or better P.R. is not clear. Some critics say it is only the latter.

⁴¹² See, e.g., BAKER, ADVERTISING, *supra* note 139, at 44-70; MCCHESENEY, *supra* note 15.

⁴¹³ See, e.g., MCCHESENEY, *supra* note 15, at 58-59. One notable case of suppression is the saga of Jane Akre and Steve Wilson, investigative journalists who alleged they were retaliated against by Fox News for questioning the widespread marketing of Monsanto’s rBGH (Bovine Growth Hormone) product to dairy farmers and the negative consequences for the public health. Akre and Wilson won the Goldman environmental prize for this reporting. The Goldman Environmental Prize, <http://www.goldmanprize.org/node/65> (last visited Aug. 13, 2007). And at least one book was written on the suppression of reporting (although only some of the suppressions were alleged to have resulted from advertising pressure or fear of it). KILLED:

According to Judge Richard Posner, news itself is a commodity like everything else. "Being profit-driven, the media respond to the actual demands of their audience rather than to the idealized 'thirst for knowledge' demand posited by public intellectuals and deans of journalism schools."⁴¹⁴ However, he theorizes that fortunately, for those who are interested in the truth, there is nevertheless "a market demand for correcting the errors and ferreting out the misdeeds of one's enemies. . . ."⁴¹⁵

One's assessment of the efficacy of the market as a checking function on misinformation may depend upon the time frame one uses. For example, it is clearly the case that the manifold detrimental health consequences of smoking became undeniably manifest over time. But that time frame constitutes several decades, perhaps more than half a century between the time that the tobacco companies were aware of those negative health consequences and when they were prepared to acknowledge or disclose them. And marketing efforts to sell cigarettes and to soft-pedal the dangers continue to this day. It is difficult to say how many lives might have been saved if the truth had been more readily available earlier and these companies not been permitted to engage in the manipulation of public information for so long.

Similarly, the market correction did not come soon enough for many of Enron's stockholders, employees, creditors, and investors.⁴¹⁶ In fact, it is probably fair to say that it was not solely those with a direct investment in Enron who felt the pain of its collapse but, rather, that it caused widespread market shocks that rippled through the economy as a whole. Whether these were ultimately salutary remains to be seen. And however much it may be argued that in the case of Enron the signs were there for all to see for some time, it seems worth asking whether the signs would have been clearer were Enron not permitted to engage in some of the techniques of obfuscation and promotional activities in question which it used. Nor is the market for truth likely to be sufficient in the future with respect to any future "Enrons." When things are going well for a company it seems Enron demonstrates that naysayers may have a difficult time being heard.⁴¹⁷

In addition, the news media have become so dependent upon the corporations themselves for the information about companies that too often their reporters rely exclusively on information from the companies

GREAT JOURNALISM TOO HOT TO PRINT (David Wallis ed., 2004).

⁴¹⁴ Posner, *supra* note 265, at 9.

⁴¹⁵ *Id.* at 9-10.

⁴¹⁶ They did arise eventually. The Enron story apparently was broken by an inquisitive *Fortune* reporter, Bethany McLean. See MCLEAN & ELKIND, *supra* note 122 (Gladwell, NEW YORKER with blog response).

⁴¹⁷ Many investors and analysts were unwilling to talk to McLean on the record. See *id.* at 321.

themselves rather than on independent newsgathering.⁴¹⁸ Such information is supplied largely in the form of press releases, web postings, press conferences, and other public relations tools. And much of the content of those releases is unregulated. Moreover, there is no entity with a clear economic motive to protect the environment, to prevent the adulteration of drugs or food, to promote equality, or to preserve many other public goods, both tangible and intangible such that we can anticipate that there will be a vigorous competition in the marketplace of ideas over certain issues in which no single entity has an economic interest.

D. *Size Matters*

Another objection to regulating the truthfulness of commercial speech where the company is large and multinational is some version of an argument that the corporation's size makes it unreasonable to require it to be strictly accurate in all its public representations. The objection is often stated in relationship to some allegation of intentionality versus negligence. It was raised by Nike in *Nike v. Kasky*⁴¹⁹ and has been raised by Wal-Mart in the class action gender discrimination suit filed against it.⁴²⁰ It may indeed be true that size inhibits the ability of a corporation to manage its information.⁴²¹ But it is not clear why that is a reason to absolve the company of liability. As the Supreme Court in *Virginia Pharmacy* noted, the corporation is surely the entity with the most knowledge about the truth or falsity of its own claims or practices.

The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and

⁴¹⁸ See, e.g., STAUBER & RAMPTON, *supra* note 131, at 179-96.

⁴¹⁹ "[C]ompanies are invariably hesitant to react when called on, as Nike has been here, to make on-the-spot responses to accusations—in this case, accusations about the more than half-million individuals employed not by it but by its subcontractors halfway around the world. Those responses will predictably be chilled first by delay while the speaker seeks to verify all the facts" Brief for the Petitioners at 40, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575).

⁴²⁰ *Dukes v. Wal-Mart Stores, Inc.* 222 F.R.D. 137, 142 (N.D. Cal. 2004) (Wal-Mart sought to decertify a gender discrimination class on the grounds of its size). For more discussion of the case and the evidence of significant centralization of operating policies at Wal-Mart, see Melissa Hart, Learning From Wal-Mart (Univ. of Colo. Law Sch. Working Paper No. 06-36, 2006), available at <http://lawweb.colorado.edu/profiles/pubpdfs/hart/HartWalMart.pdf>.

⁴²¹ See, e.g., Langevoort, *supra* note 120, at 119-24.

forgone entirely.⁴²²

The claims a corporation makes are claims presumptively made with the motive of influence public behavior or attitudes favorable to itself. It does not seem unfair to hold a corporation to the truth and accuracy of statements about itself, particularly when those statements are made in the interest of self promotion.

Moreover, it is precisely because the size of the largest corporations offers them the opportunity to have a disproportionate effect on the public and the economy at large that it is important that there be some check on their ability to manipulate public opinion. No individual can match the resources marshaled by the largest corporations to pursue their projects. And the power wielded by such entities has been a matter of some concern for American corporate law scholars from the beginning of the twentieth century into the present one.⁴²³

E. *Chilling Effect*

Finally, as noted above, the argument has been made by Nike and others that the failure to protect speech like Nike's response to the criticisms of its labor practices will have a chilling effect on a corporation's willingness to offer information. In its case brief to the Supreme Court, Nike pointed to the fact that it had not released its Social Responsibility Report because of its fears about potential liability as evidence that the chilling effect was not speculative but real.⁴²⁴

There is reason to be skeptical though about Nike's claims that it did not release its reports because of fear of future litigation rather than as an attempt to bolster its case in that litigation because it has subsequently released these reports, even though California law remains unaltered (except for the removal of the private attorneys' general portion of the relevant laws). Nike continues to post social responsibility information on its web site and to send its representatives to participate in panel discussions like one with this author that took place at the University of Miami.⁴²⁵ Presumably it would not do this if its representatives actually feared the company was at risk.

But there is a more fundamental reason why the arguments about

⁴²² Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 n.24 (1976).

⁴²³ Strine, Jr., *supra* note 186, at 11-21. See also Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77 (2002).

⁴²⁴ See, e.g., La Fetra, *supra* note 144, at 1226-28.

⁴²⁵ See *supra* note 270 and accompanying text (describing Proposition 64 and the release of the SR report).

the chilling effect are ultimately unpersuasive. And they relate to the structural incentives. In the first place, as the *Virginia Pharmacy* Court itself noted, there is reason to suppose that the incentive to promote one's product or service offers a fairly compelling counterbalance to "appropriate regulation."⁴²⁶ Such appropriate regulation might fairly be a requirement that commercial communications be truthful.

And although as subsequent commentators noted it may be that commercial entities are too easily "chilled" by the specter of economic loss in that they may suppress valuable speech when it appears that it might be unprofitable,⁴²⁷ thus (so some say) dragging culture to the lowest common denominator of commercial acceptability⁴²⁸ rather than offering a broader palate of artistic and political choices, it seems unlikely that broader immunity for false speech or less regulation is likely to significantly change that calculus. And as previously noted, the means and incentives to vigorously litigate the boundaries of speech as property in intellectual property law exerts a fairly powerfully chilling effect of its own in the other direction.⁴²⁹ Moreover, it is precisely that heightened sensitivity to the disclosure of unpopular or unfavorable information that might lead us to believe, at least in the realm of commerce, that we are better off not extending protection too broadly.

Still, for reasons explored above relating to the size of the enterprise and inherent uncertainty in the application of the law, it might be argued that this uncertainty will lead the enterprise to err on the side of caution as Nike claimed it was doing. However, the evidence suggests that existing penalties have not been sufficient to deter many of the largest, most important companies from violating the law on numerous occasions.⁴³⁰ This is not surprising since it is "[t]he possibility of imprisonment coupled with the stigma and disabilities

⁴²⁶ *Va. Pharmacy*, 425 U.S. at 771 n.24.

⁴²⁷ Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 633 (1982).

⁴²⁸ And in some cases representing a loss of valuable, truthful information as when two networks refused to carry an advertisement for condoms because their representatives apparently felt the advertisement was too racy and over-emphasized the contraceptive aspects of condom use. Andrew Adam Newman, *Pigs With Cellphones, but No Condoms*, N.Y. TIMES, June 18, 2007 at C6. According to a Fox representative, one of the networks rejecting the advertisement, "Contraceptive advertising must stress health-related uses rather than the prevention of pregnancy." *Id.* One is tempted to say, "Sez who?" Why should Fox be the arbiter of how condom use should be advertised? It may simply be deciding for itself and anticipating what it thinks its viewers want. But when there is more unanimity on a topic as there often is with what constitutes material that is controversial or unsuitable for broadcast, the dominance of commercial media will mean the information is far less likely to be conveyed effectively. And it illustrates again that although governmental orthodoxy is something to be feared, restraints on government do not remove all the sources of potential chill on valuable speech.

⁴²⁹ William A. Wines & Terence J. Lau, *Can You Hear Me Now?—Corporate Censorship and Its Troubling Implications for the First Amendment*, 55 DEPAUL L. REV. 119(2005).

⁴³⁰ See *supra* notes 241-242 (regarding Bakan's list of citations against GE).

which accompany a criminal conviction [that] will most often lead an individual to view the criminal penalties as more harmful than a civil sanction.”⁴³¹ But as we have observed, a legal fiction cannot really be deterred by shame or imprisonment since it has no self to be imprisoned or shamed. So much of the chill is warded off by the absence of the strongest part of the calculus related to chilling effect. For if the penalties are largely economic they become merely one more economic factor to weigh in the balance against the potential economic benefit of speaking.

There is more to the chilling effect doctrine than the outcome of the calculus on whether to speak or not to speak. The doctrine represents a presumption that something valuable is lost as the speech is chilled. We might trust market incentives to provide a strong enough impetus for truthful speech where the potential benefit is likely to be great and, because it is truthful, the potential liability is less than that which is knowingly false. Moreover, by their nature business decisions are often more easily quantifiable in terms of profits and losses in a way that political or personal decisions often are not. So the problem is with the middle, that potentially valuable speech the truth or falsity of which is ambiguous—it is the fear of chilling that speech which is most at issue. Is something valuable being lost?

If the protection for expression is the value of the expression as a human being the answer would seem to be “no” since, although the expression is created by human beings, it is not *of* a human being and all that entails. If the government wants Exxon-Mobil or Shell’s views on global warming it may ask for it and extend immunity in exchange for a statement. But if Exxon-Mobil or Shell wants to offer facts about global warming to promote its economic welfare, it does not seem unfair to ask that these facts be true. It will not have any motivation other than its welfare to offer them. And it does not seem unfair that the risks assumed should that speech be false or misleading, be commensurate with the economic gain that they stand to receive and the greater potential for harm flowing from the decisions of major actors in commerce than that of individuals or those entities which do not stand to gain.

[I]t must be recognized that any rule will produce some excess deterrence and thus, some chilling effect. Therefore, to say that a regulation is unconstitutional because it has a chilling effect on protected activity is to say virtually nothing at all. What we must look for is some way of determining under what circumstances the inevitable chilling effect becomes great enough to require judicial invalidation of legislative enactments, or to justify the creation of substantive rules that recognize and account for the invidious

⁴³¹ Schauer, *supra* note 157, at 697.

chill.⁴³²

At the same time,

[o]bviously one could eliminate all first amendment error by deeming every utterance protected, regardless of its potential harm. By so doing, we would minimize or eliminate the more harmful error, *but at an unacceptable social cost, and with an unacceptable increase in the error over overprotection.*⁴³³

CONCLUSION

Having once named the corporate form as a “person,” it may be difficult to turn back. Metaphors like the legal “personhood” of corporations and “the marketplace of ideas” have enduring power⁴³⁴ and can apparently, even in the minds of the most intelligent observers, represent a more appealing starting point of analysis than one grounded in an analysis of observed reality. But in the case of corporate speech and commercial speech, that metaphor has taken over the doctrine and moved the courts and observers away from the grounds on which limited protection was offered to commercial expression in the first place—protection of consumers’ autonomy rights to make their own decisions with all the truthful information—and toward a freestanding entitlement for corporations to be free of governmental regulation of their communications. To the extent that this would shield untruthful communications, it represents a perversion of the doctrine.

Large corporations have as much or more influence on our lives than the governments under which we live. They influence what we aspire to be, how to order our lives, how to allocate time between work and leisure, how to allocate income between consumption and savings, what we think is attractive in a mate or in ourselves, what we think our weddings should look like, and how we feel about ourselves given our looks and possessions. They frame some of our most urgent desires and tell us what we ought to think is important. They play a large role in the election of political candidates. They may even have a role in manipulating war and peace. They accumulate massive amounts of wealth and wield substantial influence with governments in a way that few individuals or any political coalition have ever done before or could ever hope to do. Their access to the media—the means of communicating—affect our ability to fully understand and frame the issues or to make choices.

⁴³² *Id.* at 701.

⁴³³ *Id.* at 732 (emphasis added).

⁴³⁴ See GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); Winter, *supra* note 375.

Yet, although there are many positive consequences arising from corporate energy and the dedication of these vast resources to satisfying human needs, the frames they supply often affect our health, the environment, and our emotional lives in profoundly negative ways. Despite this already profound influence, large, multinational corporations seek to use the metaphor of corporate personhood to shield themselves from the costs of these activities so as to take advantage of the rhetorical power of the notion of protection of freedom of expression as contributing to human flourishing and central to a democracy. As Professor Shiner puts it, "[t]he predatory attempt by corporations to appropriate" notions of protection for freedom of expression as contributing to human flourishing and central to democracy in order to perpetuate their dominance in our lives "needs to be exposed as the conceptual and normative fraud that it is."⁴³⁵

In *Bellotti* the Court noted that:

According to the appellee, corporations are wealthy and powerful and their views may drown out other points of view. *If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.* But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.⁴³⁶

If this was an invitation I would say that if the evidence did not exist before, it does now. It is time to reframe the debate and to see commercial speech as it is, not as we wish it to be and to reassert the worth of human beings over the institutions meant to serve them.

⁴³⁵ SHINER, *supra* note 129, at 3.

⁴³⁶ *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978) (internal citations omitted) (emphasis added).